[2020] JMCA Civ 37

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 35/2017

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA (AG)

BETWEEN	**THE JAMAICAN BAR ASSOCIATION**	**APPELLANT**
AND	**THE ATTORNEY GENERAL**	**1ST RESPONDENT**
AND	**THE GENERAL LEGAL COUNCIL**	**2ND RESPONDENT**

Richard Mahfood QC, Mrs M Georgia Gibson-Henlin QC, Miss Catherine Minto, Weiden Daley and Lenroy Stewart instructed by Wilkinson Law for the appellant

Mrs Nicole Foster-Pusey QC, Miss Tamara Dickens, Miss Carla Thomas and Mrs Donia Fuller-Barrett instructed by the Director of State Proceedings for the 1st respondent

Allan Wood QC, Dr Lloyd Barnett, Mrs Caroline Hay, Mrs Simone Mayhew, Sundiata Gibbs and Miss Candice Williams instructed by Symone M Mayhew for the 2nd respondent

19, 20, 21, 22, 23, 26, 27, 28 June 2017 and 31 July 2020

MCDONALD-BISHOP JA

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[1] The delay in the delivery of this judgment is sincerely regretted and the court apologises for it. Many variables militated against a more expeditious disposal of the matter, not least of which, was the scrupulous care that was required to peruse the voluminous material presented by the parties for the court's consideration. This was not an easy feat within the well-known constraints of the court.

Introduction

[2] The circumstances giving rise to this appeal, while not novel, are, nevertheless, of exceptional importance in this jurisdiction. For this reason, the outcome of the appeal will be far reaching in its implications for the legal profession, the Government of Jamaica and, indeed, the public at large. In focus in the appeal is the constitutionality of legislative measures implemented by the Government of Jamaica in its effort to combat money laundering and terrorist financing as part of its international obligations to tackle the scourge of organised crime.

[3] This case has given rise to the consideration of the constitutionality of several aspects of the anti-money laundering ("AML") and counter financing of terrorism ("CFT") legislative measures, promulgated by the Government of Jamaica, which have been extended to attorneys-at-law. By virtue of these legislative measures, attorneys-at-law are to be regulated in carrying out certain specified activities on behalf of their clients. The attorneys-at-law do not believe that the extension of the legislative measures to them is consonant with their position and role in a free and democratic society, governed by the rule of law and the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 ("the Charter").

[4] The appeal emanates from the decision of the Supreme Court ("the Full Court") sitting on divers days between March 2015 and May 2017. On 4 May 2017, the Full Court dismissed the claim brought on behalf of the attorneys-at-law in which they strongly challenged the AML/CFT legislative measures on constitutional and other grounds and sought reliefs in the form of declarations, stay of the implementation of the measures in relation to attorneys-at-law and injunctions.

The parties

[5] The appellant, the Jamaica Bar Association, is a limited liability company and a membership organisation, comprising attorneys-at-law on the roll of attorneys-at-law in Jamaica. The principal objects as stated in its statement of case, include, providing advocacy for attorneys-at-law in Jamaica; considering all questions affecting the interests of the legal profession; promoting, assisting and ensuring the proper administration of justice; and "to unceasingly watch over and protect the civil liberties of the people".

[6] The 1st respondent, the Attorney General, is made party to the proceedings by virtue of the Crown Proceedings Act and represents the Government of Jamaica.

[7] The 2nd respondent, the General Legal Council ("the GLC"), is a statutory corporation established pursuant to the Legal Profession Act. Part of its statutory remit is to establish standards of professional etiquette and conduct for attorneys-at-law and to designate or specify which breaches of its rules constitute professional misconduct. On 1 June 2014, in accordance with section 91(1)(g) of the Proceeds of Crime Act, the

GLC was designated the competent authority for attorneys-at-law. As the competent authority, the GLC is charged with the responsibility of monitoring the compliance of attorneys-at-law with the provisions of the AML/CFT legislative measures and to issue guidelines for attorneys-at-law in the regulated sector, regarding effective measures to prevent money laundering and terrorist financing. It is made party to the proceedings by virtue of its capacity and role as the competent authority nominated by the Minister of National Security ("the Minister").

The constitutional challenge

[8] The following instruments, forming part of the AML/CFT legislative measures, are the targets of the constitutional challenge brought by, and on behalf of the nation's attorneys-at-law and will collectively and conveniently be referred to as "the Regime":

i. The Proceeds of Crime Act, 2007 as amended by the Proceeds of Crime (Amendment) Act, 2013 ("the POCA") (since the hearing of the matter the Act has been further amended by the Proceeds of Crime (Amendment) Act, 2019);

ii. The Proceeds of Crime (Money Laundering Prevention) Regulations, 2007 ("the Regulations");

iii. The Proceeds of Crime (Designated Non-Financial Institution) (Attorneys-at-Law) Order, 2013 ("the DNFI Order");

iv. The General Legal Council of Jamaica: Anti-Money Laundering Guidance for the Legal Profession, published in the Jamaica Gazette Extraordinary of Thursday, 22 May 2014, No 22^{3}A ("the GLC Guidance");

v. The amendment to the Legal Profession Act to insert section 5(3C) as well as any regulation(s) made pursuant thereto, including the Legal Professional (Annual Declaration of Activities) Regulations, 2014; and

vi. The Legal Profession (Canons of Professional Ethics)(Amendment) Rules, 2014 that amends the Legal Profession (Canons of Professional Ethics) Rules, 1978 ("the Canons") to permit attorneys-at-law to reveal client confidences or secrets in compliance with the POCA and the attendant regulations.

[9] On 13 October 2014, the appellant filed a fixed date claim form contending that the Regime, in so far as it relates to attorneys-at-law is, "unconstitutional, overboard, unenforceable or otherwise vague and unlawful". The appellant's challenge, on constitutional grounds, is that the Regime contravenes sections 13(3)(a), 13(3)(c), 13(3)(j)(i), (ii) and (iii) of the Charter as well as section 16 of the Constitution. These rights are:

i. the right to liberty and security of the person and the right not to be deprived thereof, except in the execution of a sentence of a court in respect of a criminal offence of which the person has been convicted (section 13(3)(a));

ii. the right to freedom of expression (section 13(3)(c));

iii. the right of everyone to:

a. protection from search of the person and property (section 13(3)(j)(i));

b. respect for and protection of private and family life, and privacy of the home (section 13(3)(j)(ii)); and

c. protection of privacy of other property and of communication (section 13(3)(j)(iii)).

iv. the right to a fair hearing (section 16).

[10] The appellant had also claimed contravention of section 7 of the Charter. That claim is, however, clearly erroneous, as this section is not a provision of the Charter.

[11] The core of the appellant's challenge is that the impugned legislative measures that have been extended to attorneys-at-law by the Regime:

i. are in conflict with and/or threaten the independence of the Bar and the integral and essential role played by attorneys-at-

law in the proper administration of justice and maintenance of the rule of law;

ii. have breached or are likely to breach the constitutional rights to privacy, liberty and fair hearing as guaranteed to every individual in Jamaica by the Charter; and

iii. have breached attorneys-at-law's duty of confidentiality and loyalty to their clients.

[12] An appreciation of the historical background to and purpose of, the Regime is salient in the ultimate determination of the critical issue concerning its constitutionality. For that reason, it is considered useful to provide a broad overview of the circumstances that have led to the initiation of the proceedings in the Full Court.

[13] Before proceeding to provide the overview of the background facts, however, it is considered only fitting to expressly acknowledge, with much gratitude, that very useful and reliable information as to the relevant facts and circumstances, which constitute the historical background to the case, is substantially garnered from the GLC Guidance, the submissions of the respondents, and the judgment of the Full Court, which form part of the record of this court. The court's work has been rendered easier by this invaluable assistance.

The background

[14] Globalization, with all the benefits that are, and still may be, derived from cross-border interaction in critical areas, and has, unfortunately, given rise to the undesired proliferation and growing sophistication of organised crimes. The United Nations Office on Drugs and Crime ("the UNODC") describes organised crime as being a "changing and flexible phenomenon", which affects all states and for that reason, it has long been recognised by the international community that it must be confronted and eradicated by a collective, concerted and global response.

[15] Terrorism financing has also been recognised as having a destabilising and debilitating effect on the global socio-economic and political landscape. It is recognised that funds given in support of terrorist activities may come from both legal as well as illegal sources. Hence the focus of the global community on countering the financing of terrorism measures.

[16] The single most important objective of this global response to the threats posed by these phenomena is to take the profit out of crime, that is, to deprive offenders of their ill-gotten gains. AML/CFT measures have been developed, in recent times, as significant tools in the global community's fight against organised crime. This response has arisen because of the tendency on the part of criminals to engage in money laundering to disguise their activities and earnings in an effort to clothe them with legality. This is geared at avoiding detection and to enable criminals to maintain control over the proceeds of their criminal activities.

[17] As part of a collective global response to the dangerous threat posed by money laundering and terrorism financing, the Financial Action Task Force ("FATF") was founded in 1989 by the leading industrial nations at the G7 Summit in Paris, France, following the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 ("the 1988 UN Vienna Convention"). FATF promulgated several recommendations in setting the standards for the effective implementation of legal, regulatory and operational measures geared at protecting and preserving the integrity of the international financial systems.

[18] In 1990 FATF issued 40 recommendations, which were revised in February 2012, on the international standards for combating money laundering and the financing of terrorism and proliferation ("the FATF Recommendations"). It required regional inter-governmental organisations to achieve the global implementation of its recommendations. The Caribbean Financial Action Task Force ("CFATF") is one such organisation. Jamaica is a signatory to the 1988 UN Vienna Convention and a member of CFATF.

[19] In the mid 1990's, Jamaica, like other member states of CFATF, entered into a Memorandum of Understanding by which it, among other things:

i. agreed to adopt and implement the 1988 UN Vienna Convention;

ii. endorsed and agreed to implement the FATF Recommendations;

iii. agreed to fulfil the obligations set out in the Kingston Declaration on Money Laundering issued in 1992; and

iv. agreed to adopt and implement any other measure for the prevention and control of the laundering of the proceeds of all serious crimes as defined by the laws of Jamaica.

[20] The Government of Jamaica, therefore, has an international obligation, as part of its global responsibility, to implement measures to combat money laundering and terrorism financing. This obligation has resulted in the promulgation of various pieces of legislation as part of the AML/CFT measures. The implementation of the Regime is one such measure.

[21] Initially, only banks and other financial institutions were required to implement systemic and procedural safeguards to combat money laundering. This was soon realised to have been inadequate in the light of the various forms money laundering may take and the avenues that could be used to facilitate it. FATF had evaluated the risks attendant on some activities and found that attorneys-at-law are susceptible to being used in money laundering. Attorneys-at-law, like some other specified professionals, are characterized as "gatekeepers" because they "protect the gates to the financial system", through which launderers must pass in order to succeed. FATF has recognised that the services of gatekeepers are a common element in complex money laundering schemes and that the gatekeepers' skills are important in creating legal structures and systems that could be used in money laundering processes.

[22] In the light of this, FATF Recommendation 22 was promulgated, requiring member states to regulate financial as well as some designated non-financial institutions ("DNFIs"), professionals and business organisations as part of its AML/CFT measures. The Government of Jamaica, therefore, took steps to implement FATF Recommendation 22, through, among other things, the promulgation of the DFNI Order, by virtue of the powers conferred on the Minister, by section 94(1) and paragraph 1(2) of the Fourth Schedule of the POCA.

[23] By the DFNI Order, attorneys-at-law (as well as other specified professionals) who engage in the following specified transactions are brought within the regulated sector:

i. purchasing or selling real estate;

ii. managing money, securities or other assets;

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

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

v. creating, operating or managing a legal person or legal arrangement (such as a trust or settlement); or

vi. purchasing or selling a business entity.

[24] For the purposes of this judgment, where necessary, the term "regulated attorneys-at-law", will be used to refer specifically to attorneys-at-law in the regulated sector, while the term "attorneys-at-law" means, attorneys-at-law, in general, that is whether regulated or not.

[25] Attorneys-at-law were always subject to prosecution, like everyone else, for the general money laundering offences under the POCA, which include:

i. the principal money laundering offences under sections 92 and 93;

ii. the offence of failing to report suspected money laundering under sections 94, 95 and 96; and

iii. the offence of tipping off about a money laundering disclosure, and the prejudicing of money laundering investigations under section 97.

[26] The DNFI Order now imposes duties on regulated attorneys-at-law, when engaged in the specified activities, to collect and store certain information from their clients; keep records of transactions; and to disclose certain relevant information to the appropriate authorities as prescribed under the POCA.

[27] It is for this reason that the amendment to the Legal Profession Act, to include section 5(3C), was promulgated. As a consequence, all attorneys-at-law are now required to file a declaration in the form prescribed by the Legal Profession (Annual

Declaration of Activities) Regulations, 2014, disclosing whether or not they have conducted any of the activities listed in the DNFI Order. It is on this basis that the GLC will be able to ascertain the attorneys-at-law who are to be regulated.

[28] Regulated attorneys-at-law are also subject to the examination of materials in their possession or under their control and may be asked to provide copies of the information that they are required to collect, record and retain from their clients. They also have a statutory obligation to ensure that there are internal programmes implemented by them, in their business operations, to ensure compliance with the Regime.

[29] The Regime also provides that the GLC as the competent authority is empowered to periodically examine and take copies of documents and information in the possession or under the control of regulated attorneys-at-law. The GLC may also share information obtained from those examinations with specified third party state agents.

[30] The Regime also makes provision for penal sanctions for non-compliance by regulated attorneys-at-law with its various stipulations.

Proceedings in the Full Court

(a) <u>The appellant's case</u>

[31] The appellant relied on the affidavit evidence of three affiants in seeking to establish its claim and its entitlement to the reliefs sought. The first affiant was Mr Donovan Jackson, an attorney-at-law and one of its members. In his affidavit sworn to

on 13 October 2014, Mr Jackson deposed to the appellant's mandate and objective, which among other things, include:

i. a duty to act as a "watchdog", fighting for the maintenance and strengthening of the rule of law and human rights;

ii. a duty to ensure the independence of judges and attorneys-at-law; as well as

iii. a duty to work with all stakeholders towards proper law reform and the improvement of the legal and justice systems.

[32] Mr Jackson drew attention to paragraph 14 of the GLC Guidance, which establishes, among other things, that the terms of the DNFI Order are to be interpreted broadly and are intended to encompass all services provided by a regulated attorney-at-law from the time he is first engaged or consulted by or on behalf of a client.

[33] Mr Jackson also directed attention to the examination function of the GLC and its authority to make copies of documents in the possession of regulated attorneys-at-law; employ third parties; and share information with other authorities involved in the enforcement of the POCA or other analogous legislation. He highlighted the power of the GLC to issue directives with attendant imposition of criminal sanctions and disciplinary penalties for non-compliance. All these matters, Mr Jackson noted, raised significant issues of concern for the security and liberty interests of regulated attorneys-at-law and their clients.

[34] The Regime, he said, has imposed a significant burden on regulated attorneys-at-law by, among other things, requiring them to store and secure information that would otherwise not ordinarily be required by them to complete the legal transaction being undertaken; and requiring that clients and services are placed into high-risk or low-risk categories, which, depending on the category, requires, among other things, enhanced due diligence procedures.

[35] Mr Jackson averred that the identification and transaction verification procedures, record-keeping procedures and disclosure obligations are unclear as to which specific act or activity of an attorney-at-law on his client's behalf would be in breach of the Regime. He further deposed that adherence to the Regime's requirements, particularly those concerning the record-keeping and reporting obligations, raises serious issues concerning the independence of the Bar, attorney-at-law/client confidentiality, legal professional privilege ("LPP") and loyalty to their clients by attorneys-at-law. He contended that the trust and confidence between regulated attorneys-at-law and their clients will be replaced by "distrust and a lack of confidence which can and will seriously damage the structure of the legal system...".

[36] The second affiant for the appellant was Mr Donovan Walker, a former president and member of the appellant. In his affidavit of 28 November 2014, he outlined in some detail, how the Regime affects "the traditional attorney/client relationship". He also identified several areas of concern with the Regime, which include the following:

i. the collecting and storing of information from clients, some of which may be more than what is required to conduct the particular matter;

ii. this information being made available to the state through state authorities such as the GLC and the Chief Technical Director of the Financial Investigation Division ("the FID"), as the designated authority. The information could be made available through the examination of the business operations of regulated attorneys-at-law under the Regime;

iii. requiring the consent of the FID before regulated attorneys-at-law may proceed to engage in certain matters as well as the filing of suspicious transaction reports, all without the client's knowledge; and

iv. information being sent to foreign authorities without the input of the clients or order from any court in Jamaica as well as regulated attorneys-at-law not being given the opportunity to claim LPP on their client's behalf.

[37] Mr Walker deposed that the requirement for the making of suspicious transaction reports to the FID creates a "serious conflict" between a regulated attorney-at-law's duty of confidentiality to his client and his duty to report confidential information to the FID. This situation, Mr Walker stated, is "invidious", as, while an attorney-at-law is

placed in a fiduciary position as between himself and his client, the Regime also makes him a "secret double agent for the state while masquerading as giving [a] client...undivided loyalty and attention".

[38] Mr Walker questioned the subjectivity of the suspicious transaction reporting requirements. He stated that as there is no standardised definition as to what constitutes "sufficiently suspicious" to require a report or standardised guidance as to what is to be reported, this is left to an attorney-at-law's subjective opinion. This, he stated, may lead to a regulated attorney-at-law inadvertently breaching the Regime.

[39] Mr Walker acknowledged that the POCA makes provision for a regulated attorney-at-law to assert LPP concerning client information. However, he noted that the attorney-at-law is not able to claim privilege in relation to the information without the input of the client. This is because, he said, privilege belongs to the client, and if an attorney-at-law were to forewarn a client, he would be exposed to criminal sanctions. The regulated attorney-at-law is also exposed to claims from the client in situations in which he failed to secure the client's consent or instructions concerning entitlement to LPP.

[40] Being forced to withhold information from clients relating to LPP, Mr Walker averred, creates a conflict of interest, as the client would not know that a suspicious transaction report had been filed in relation to him or that consent had been requested through the FID concerning him. He contended further that the defence of privilege, as

outlined in the POCA and the Regulations, is not beneficial, as it would only arise after the regulated attorney-at-law or his client had been placed at risk.

[41] Mr Walker also deposed that the issues raised concerning the constitutionality of the Regime are exacerbated by what are "warrantless searches", which may arise through the examination conducted by the GLC.

[42] He concluded by highlighting that the Regime, "interferes to an unacceptable degree with the independence of the Bar" and impinges on the Constitution.

[43] On 4 February 2015, Mr Walker filed a further affidavit in which he responded to the case presented by the 1st respondent. He contended, for reasons detailed by him, that the affidavit evidence of Mr Robin Sykes and Mr Albert Stephens have not justified the extension of the Regime to attorneys-at-law. He also refuted the claim by them that the Regime is not in conflict with the principles of LPP.

[44] The third affiant for the appellant was Mr Ian Wilkinson QC, who was its president from March 2011 to 22 March 2014. In his affidavit sworn to on 19 December 2014, he primarily, responded to the evidence of the GLC and chronicled the several discussions and meetings between the various stakeholders leading up to the promulgation of the Regime. He also endorsed the evidence of the previous two affiants emphasising, in particular, that as the Constitution had been breached by the Regime, the attempt by it to recognise the principle of LPP was merely ineffective and meaningless words that could not remedy the damage that had been done.

(b) The respondents' case

[45] Both respondents opposed the appellant's claim. They averred that the Regime is not unconstitutional and, so, the declarations sought by the appellant should be denied. The case advanced by each respondent will now be outlined.

The 1st respondent's case

[46] The 1st respondent relied on the evidence of Mr Robin Sykes, the former General Counsel for the Bank of Jamaica ("BOJ") and Mr Albert Stephens, the Principal Director of the FID.

[47] The evidence of Mr Robin Sykes is contained in affidavits filed on 23 October 2014 and 7 January 2015. He stated that he was well acquainted with Jamaica's AML/CFT requirements and was integrally involved in the promulgation of the regulatory aspects of the framework, including those under the POCA.

[48] He outlined in detail the international conventions relating to combating money laundering and referenced, in particular, the most recent FATF Recommendations for preventing and controlling money laundering and for assessing technical compliance. He noted Jamaica's commitment to adhering to the FATF Recommendations and that in the last mutual evaluation, Jamaica was criticised for failing to extend AML/CFT obligations to designated non-financial businesses and professionals ("DNFBPs"), which, by definition, includes attorneys-at-law. He outlined that as a consequence of Jamaica's failure to implement these legislative provisions, in September 2012, it was recommended that Jamaica be moved to the second stage enhanced follow up

category. It was in response to these developments, as well as to deal with other recommendations arising from the mutual evaluation report, that measures were adopted by the Government of Jamaica to obtain compliance, which included, among other things, an amendment to the POCA.

[49] A consequence of failing to make efforts to comply with the FATF Recommendations, Mr Sykes deposed, could result in a country being subjected to a public notice. In addition, member countries could be encouraged to adopt certain counter measures affecting financial institutions in Jamaica. Mr Sykes used Guyana as an example, where, as a result of perceived inaction by the Guyanese Government in addressing the deficiencies in the country's AML/CFT framework, that country was subjected to a public notice issued by CFAFT. This resulted in Guyana being deemed to be a risk to the international financial system.

[50] The consequence of this categorisation, Mr Sykes warned, would make it very difficult for financial institutions in Jamaica to operate and/or engage in cross-border transactions or may result in reduced investor confidence as well as reduced correspondent banking relationships with financial institutions.

[51] Mr Sykes deposed that the extension of the POCA to include, among other things, DNFBs has been viewed positively, so much so that, in its 10th follow up report on 29 May 2014, FATF recommended that Jamaica be placed in regular yearly follow up. Restraining the implementation of the Regime's application to attorneys-at-law, Mr Sykes averred, would "represent a significant weakening of the Jamaican AML/CFT

framework". This would cause, he said, foreign governments, multilateral agencies and overseas commercial counterparties to consider Jamaica to be a jurisdiction at higher risk of money laundering and adjust their business relationships accordingly.

[52] In his second affidavit Mr Sykes deposed that through the Caribbean and European Union, countries have implemented anti-money laundering legislation and regulations geared towards the legal profession. He highlighted in particular that anti-money laundering regulations for attorneys-at-law have been implemented in Aruba, Bermuda, Dominica, Trinidad & Tobago, the Virgin Islands as well as Antigua and Barbuda in various forms and requirements.

[53] He highlighted that the situation in Jamaica is such that the main causes of violence and homicide are transnational criminal organisations and local gangs who are supported by corruption, fraud, extortion and money laundering. Money laundering and persons who facilitate money laundering are Tier 1 Threats (high impact) to Jamaica and, therefore, require top priority treatment by the Government of Jamaica. It is against this background that the Regime had been extended to attorneys-at-law to prevent them from becoming potential accomplices for money laundering, he stated.

[54] Mr Albert Stephens deposed in his affidavit, sworn to on 7 January 2015, that Jamaica, as a member of the CFATF, must adhere to specific standards established by FATF which expressly requires member states to implement legal, regulatory and operational measures for combating money laundering and terrorist financing.

[55] His evidence highlighted that there are several critical FATF Recommendations which must be adhered to by member states and these include, Recommendation 1, which states that countries should identify, assess and understand money laundering and terrorist financing risks for the country, and should take action aimed at ensuring the risks are mitigated effectively.

[56] Mr Stephens deposed that the FID receives numerous suspicious transaction reports from financial institutions and indicated the reasons for which suspicious transaction reports have been made in relation to attorneys-at-law. He deposed that between 2008 and 2015, the FID received over 200 reports from financial institutions filed in relation to attorneys-at-law practising in Jamaica. The reasons for these reports include:

i. large cash deposits, especially in US currency;

ii. cash deposits used to purchase US drafts for third parties;

iii. refusal to provide source of funds information;

iv. inability or refusal to provide adequate "know your customer" ("KYC") information;

v. structuring of cash deposits, that is, deposits made frequently just below the thresholds;

vi. clients' funds being placed on investment accounts in the name of the attorney-at-law;

vii. clients' funds being used in risky investment enterprises, including internet gaming and unlicensed alternate investment schemes;

viii. accounts of attorneys-at-law being used to transfer questionable funds internationally;

ix. multiple remittances being received from different senders;

x. large outbound transfers with reasons given for these transfers not being credible;

xi. multiple foreign exchange conversions with limited source of funds information;

xii. funds from clients, who are under investigation or who have been charged by the police, being transferred to accounts in the names of their attorneys-at-law;

xiii. cash deposited directly to an attorney-at-law's accounts by third parties (not being clients of the attorney-at-law) involved in transactions especially property transactions; and

xiv. inactive or dormant accounts being activated to receive large wire transfers.

[57] Mr Stephens highlighted that investigations have been carried out on attorneys-at-law against whom reports were received from financial institutions under the POCA and these investigations have led to the arrest and charge of, at least, two attorneys-at-law for money laundering.

[58] Mr Stephens concluded that he was of the view that attorneys-at-law, based on their interactions with individuals and their activities in treating with client funds under their control, are at an elevated risk of being vulnerable to being used as "conduits" of money laundering.

The GLC's case

[59] Mr Michael Hylton QC, then chairman of the GLC, gave evidence on its behalf, by way of affidavit filed on 28 November 2014. He deposed that the posture of the GLC Guidance demonstrates the view of the GLC that the application of the Regime to attorneys-at-law was limited to prescribed activities. He pointed out that the obligations imposed are not applicable when attorneys-at-law are engaged as officers of the court in the representation of clients in criminal or civil proceedings or in giving legal advice.

[60] Concerning the constitutionality of the Regime, Mr Hylton asserted that paragraph 15 of the GLC Guidance adopts a position that is in keeping with decisions turning on the European Convention on Human Rights ("the Convention"). He further deposed that constitutional safeguards are also preserved concerning LPP. The GLC

Guidance, he posited, makes it clear that in carrying out its examinations, the GLC is not entitled to disclosure of communications or documents that are subject to LPP. The GLC Guidance recommends that regulated attorneys-at-law adopt measures such as the segregation of documents to prevent inadvertent disclosure in the course of examinations. This action, Mr Hylton deposed, would be feasible and practical to do.

[61] He further noted that the GLC only conducts examinations after notice is given to a regulated attorney-at-law and that the GLC Guidance sets out, in detail, the examination process, which focuses primarily on ensuring that a regulated attorney-at-law is compliant with the obligations imposed by the Regime. According to Mr Hylton, these examinations, conducted after prior notice is given, would not amount to a search of the offices of regulated attorneys-at-law. Mr Hylton averred that the GLC Guidance does not permit the entering of the offices of regulated attorneys-at-law without their permission neither is there any right in the course of examinations to access or copy documents if the regulated attorney-at-law refuses to divulge them. In the event of refusal, he said, the GLC would be required to seek disclosure and search orders from the court under the POCA.

The decision of the Full Court

[62] Having considered the evidence and arguments of the parties, the Full Court at paragraph [37] of its judgment, distilled the issues to be considered as follows:

> "1. Whether the Regime undermines the principles of Legal Professional Privilege (Constitutionally or otherwise)?

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

3. Whether the Regime breaches the constitutional right to privacy or breaches attorney-client confidentiality?

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

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

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

[63] After a comprehensive examination of those issues, the Full Court concluded, that the appellant's claim failed. The following represents a basic outline of the bases for its conclusion.

Issue 1: Whether the Regime undermines LPP

[64] The Regime does not undermine or erode LPP but rather explicitly protects and preserves it. The activities in the DNFI Order are not generally transactions within a relevant legal context and, therefore, are not accorded the protection of LPP. However, in the few instances where a relevant legal context exists, the exemption from LPP, in relation to communications with the intention of furthering a criminal purpose, would almost, invariably, apply to the disclosure of suspicious transactions required by the Regime. Consequently, LPP plays an insignificant role, as it would only be in rare circumstances that it would attach to communications in relation to transactions concerning the regulated activities. Furthermore, any potential breaches of LPP would

be further safeguarded by the fact that examinations are conducted by the GLC, which is the regulatory body for attorneys-at-law and the examinations can only be conducted after prior notice has been given to the attorneys-at-law and their consent has been obtained.

[65] It is not established that LPP is left vulnerable, eroded or breached as a result of the powers of examination and the taking and sharing of information granted to the GLC under the Regime.

Issue 2: Whether the Regime subjects regulated attorneys-at-law to unconstitutional searches and seizures

[66] The Regime does not subject regulated attorneys-at-law to unconstitutional searches and seizures. Warrantless searches and seizures are not authorised by the Regime. The POCA permits the GLC to examine and take copies of information or documents in the possession or under the control of regulated attorneys-at-law but only after notice has been given to them and their permission received. The examinations are largely based on a regulated attorney-at-law's willingness to cooperate and he is able to assert privilege prior to any examinations, thus safeguarding LPP. Furthermore, it is to be presumed that the statutory power will be exercised in keeping with the respect for the fundamental rights set out in the Constitution. Therefore, the presumption is that the GLC, in exercising its statutory mandate, will act in a manner which accords with, rather than derogates from, the fundamental rights enshrined in the Constitution. It is implied that its power is to be exercised in accordance with the principles of natural justice and fair procedures.

Issue 3: Whether the Regime breaches the constitutional right to privacy or attorney-at-law/client confidentiality

[67] The rights to privacy and confidentiality, as guaranteed by sections 13(3)(j)(ii) and (iii) of the Charter, have been interfered with by the disclosure, reporting and record-keeping obligations imposed on regulated attorneys-at-law by the Regime. The Regime restrains regulated attorneys-at-law from communicating frankly with their clients, which is a breach of the constitutional rights to private life and protection of privacy of communication.

Issue 4: Whether the Regime infringes attorneys-at-law's (and/or their clients') right to liberty in a manner that is unconstitutional

[68] The Regime engages the liberty interests of both regulated attorneys-at-law and their clients, but they are not infringed in a manner that is unconstitutional, given that any proceedings against a regulated attorney-at-law and/or his or her client, which would lead to the deprivation of liberty, would be in accordance with the exception under section 13(3)(a) of the Charter. There is no arbitrary or unjustified deprivation of liberty occasioned by the Regime although the liberty of regulated attorneys-at-law is imperilled. Any deprivation of liberty, pursuant to the Regime, would be subject to due process.

Issue 5: Whether the Regime infringes the independence of the Bar

[69] The obligations imposed on regulated attorneys-at-law extend only to limited and specified activities, which would not engage or compromise them in their traditional duties or roles in giving legal advice or providing legal representation in relation to actual or contemplated litigation. The Regime is, therefore, not inconsistent with the

position of regulated attorneys-at-law in their respective roles in the administration of justice and the maintenance of the rule of law.

[70] The disclosure, identification, verification and retention requirements of the Regime are within proper limits. The Regime satisfies the objectives of the legislation without breaching the constitutional rights of regulated attorneys-at-law and their clients as well as without causing regulated attorneys-at-law to be in breach of their commitment to their clients' cause. Given that the requirements of the Regime are within proper limits, any concerns about regulated attorneys-at-law being a state agent, compromising the right to independent counsel and to a fair trial, would not arise.

Issue 6: Whether any infringement of a Charter right, as found, is justifiable in a free and democratic society

[71] The objective to be served by the Regime is of sufficient importance such as to warrant the infringement of the privacy rights of regulated attorneys-at-law and their clients, guaranteed by section 13(3)(j)(ii) and (ii) of the Charter. The fact that the Regime only imposes obligations on regulated attorneys-at-law when they engage in specified activities, clearly illustrates that the objective of the Regime is not to arbitrarily interfere with the rights of regulated attorneys-at-law or their clients but, rather, to effectively address a critical social concern.

[72] Any infringement is, therefore, minimal and goes no further than is necessary. It is not substantial and is proportionate given the objectives of the Regime to combat money laundering and terrorist financing. Where there are infringements, the Regime includes sufficient safeguards so that minimal impairment of these rights is occasioned

in the pursuit of "undoubtedly important objectives". The infringement of the Charter by the Regime is demonstrably justified in a free and democratic society and, therefore, constitutional.

The appeal

[73] Aggrieved by the decision and reasoning of the Full Court, the appellant filed its amended notice of appeal on 19 May 2017. This notice of appeal was further amended during the course of the hearing of the appeal on 20 June 2017. The appellant relied on 29 wide ranging and substantially overlapping grounds of appeal, some of which have been divided into minor grounds (amounting to at least 54 grounds of appeal). At the hearing of the appeal, the appellant sought and was granted leave to amend two grounds (grounds (o) and (v)). The grounds of appeal, as filed, are as follows:

> "a. The Full Court Judges erred as a matter of fact and/or law and/or wrongly exercised its discretion in refusing to grant the orders sought in the Fixed Date Claim Form which challenged the Constitutionality of the Proceeds of Crime Act, The Proceeds of Crime Act (Designated Non-Financial Institution) Attorneys (Order), 2013 (DNFI Order) Regulations, Orders and Guidance (The Regime) such as to amount to a miscarriage of justice.
>
> b. The Full Court Judges failed in their duty to deliver reasons such that it is not possible for the Appellant to formulate all of the arguable grounds of appeal available to it thereby substantially depriving it of the opportunity of filing its appeal urgently or receiving urgent interim relief in this complex matter involving fundamental rights and freedoms of solicitor client privilege, the right to be free from search and seizure, encroachments on the rule of law and the administration of justice.
>
> c. The Full Court Judges failed in their duty to deliver reasons in a timely or reasonable manner such that it is

deprived of the opportunity to vindicate its rights before the Courts in a timely manner resulting in prejudice such as impacts the rule of law and the proper administration of justice.

d. The Full Court erred as a matter of fact and/or law in imposing a presumption of constitutionality in the context of the Charter of Fundamental Rights & Freedoms.

e. The Full Court judges erred as a matter of law in finding that the criminal standard of proof is applicable to rebutting the presumption of constitutionality.

f. The Full Court judges erred as a matter of law when they imposed on the Appellant the criminal standard of proof to rebut the presumption of constitutionality or to prove that the Regime was unconstitutional.

g. The Full Court judges erred as a matter of law in finding that the starting point is to establish that LPP applies to the activities engaged under the Regime.

h. The Full Court judges erred as a matter of fact and law in approaching the issues from the question of whether the activities specified in the Order attract LPP as opposed to whether LPP and the liberty interests of lawyers and their clients are placed are or are likely to be infringed consequent the measures imposed by the Regime.

i. The Full Court judges erred as a matter of law in finding that the activities in the Order when performed by attorneys-at-law do not take place in a relevant legal context and accordingly not engaging the 'cloak of privilege' as being activities ordinarily associated with or likely to involve the furthering of a criminal purpose.

j. The Full Court judges erred as a matter of law by starting and ending their analysis with the wrong question that is, 'are the activities in the Order such that, communication between attorney and client for the purposes of these transactions, within a relevant legal context?' with the result that they wrongly concluded that because the activities in the Order are or are likely to further a criminal purpose then they will rarely occur in a relevant legal context or that STRs are unlikely do [sic] not attract LPP.

i. This approach is prima facie unjust, unreasonable and unconstitutional because it operates as a justification for removing protections offered by LPP without judicial scrutiny once attorneys are engaged in the transactions covered by the Order:

a. it destroys the presumption of innocence; by placing the client and the attorney in a prima facie position of guilt once they are engaged in transactions covered by the order.

ii. The court restricted its interpretation of LPP to litigation privilege.

k. The Full Court judges erred as a matter of law in failing to recognise that the issue is whether, or accept submissions that, the Regime has no machinery for protecting LPP and therefore wrongly engaged in an analysis reserved for the judge hearing a dispute as to whether LPP attaches or an application as to whether LPP is properly claimed in a given set of circumstances.

l. The Full Court judges erred as a matter of law in failing to accept the submissions that sections 94, 95 and Paragraph 16 of the Guidance do not safeguard LPP insofar as they do not include provisions or a [sic] mechanisms that enable the attorneys to assert privilege on their client's behalf or in circumstances where the attorney may also be the subject of criminal liability, an investigation or search pursuant to those sections.

m. The Full Court judges erred as a matter of law in finding that LPP is protected and not taken away by the GLC inspections as recommended in the Guidance in that they fail to recognise and/or accept that LPP belongs to the client and not the attorney.

n. The Full Court judges erred as a matter of fact and law when they found that the [GLC's Guidance] was sufficient to protect the interests advanced by the Appellant or that in Canada, the Law Society Rules were similar to those in the instant case:

i. There is a distinction between the attitude and approach of the regulator, the Federation of Law

Societies in Canada (Attorney General) v FLSC and the [GLC as] regulator in the instant case insofar as the challenge in Canada was brought by the regulator.

ii. It is a misapplication of the facts and law to find it significant in these circumstances that there was no challenge to the 'Law Societies' regulations or that in Canada there were Law Society regulations with more such as to lead to a grave miscarriage of justice in the instant case

iii. In the Canadian case, the challenged provisions of the legislation and regulations went much further than the Societies proposed rules.

iv. In the instant case, Jamaica, the [GLC's] Guidance is similar to the challenged legislation and regulations and are more far reaching than the Government regulations that were under challenge in Canada and the Law Society model rules.

v. The [GLC's] status as a regulator and a body that is composed of attorneys who are the guardians of the standards of the legal profession does not immune its actions from Charter challenge having regard to sections 13(1), 13(2) and 13(5) of the Charter.

vi. In Jamaica even with the [GLC's] direct involvement in the search and examination of files, there is no provision or mechanism for claiming LPP.

o. The Full Court judges erred as a matter of fact and/or law in finding that the provisions empowering the [GLC] to examine or take copies of documents and/or monitor compliance is not a power to search because notice is given to attorneys who are given an opportunity to sort the information and required to hand over material that is not subject to LPP for examination and copying.

p. The Full Court judges erred as a matter of fact and/or law and/or failed in their assessment of the importance and significance to be accorded to LPP as a fundamental right when they found that there is no breach of LPP in the absence of judicial scrutiny or scrutiny by an independent

third party as it is no different from the requirements of any other Competent Authority that regulate DFNIs.

q. The Full Court erred in relying on the fact that the powers under section 91A(2)(d) of POCA which allows the sharing of information is one of the key aims of international cooperation contained in international treaties (paragraph 215). The key aim of international treaties cannot justify the abuse involved in the sharing of information under the POCA Regime.

r. The problem with the Full Court's approach and analysis as with the [GLC's] that it has adopted [245] is that there is a misconception of the issues before the Court. The approach throughout the judgment is to analyse and discuss the issues as if the Appellant is disputing a claim or issue as to whether privilege or confidentiality arises as distinct from the real risks of infringement posed by the regime to confidentiality and LPP. This led to further error whereby the objects of the Regime are analysed prior to the threshold question of whether or not the Regime gives rise or is likely to give rise to the infringements alleged:

i. There is no question of the attorney turning a blind eye as is presumed and hence the significance of Donovan Walker's evidence to demonstrate that the Bar being cognizant of its duty is of the view that the Regime has gone too far and trenches [sic] on fundamental rights and freedoms as protected by the Constitution and relied on herein.

ii. Nevertheless the Court's entire analysis is focused on the exceptions to privilege and confidentiality in circumstances where the client's intent is to further a criminal purpose against the objectives of POCA and the common law when there was no dispute as to these issues.

s. The Full Court judges erred when they failed to consider that any breach of the privilege protecting communications between a client and an attorney could lead to the violation of one of Jamaica's most fundamental principles of law, namely, that an accused person cannot be compelled to testify against himself or to make any statement amounting to a confession or admission of guilt. The accused person,

[sic] not obliged to testify against himself, could have a confession extracted through privileged communications with his attorney: section 13(j)(iii) and 14(2)(d), and of 16(6)(f) of the Constitution.

t. The Full Court erred as a matter of law in finding that the Regime does not breach section 13(3)(a) of the Charter of Fundamental Rights and Freedoms. The Court adopted an erroneous analysis of the section by limiting its meaning to when a conviction has occurred and by reference to section 7 of the Canadian Charter and the principles of fundamental justice enshrined therein without reference to an analysis of the actual words of the Charter.

u. The Full Court erred in finding that the absence of the mechanism of principles of fundamental justice indicated a comparative weakness of the rights granted under the section 13(3)(a) of Jamaican Charter as opposed to those granted under section 7 of the Canadian Charter, since a proper analysis of the rights under both constitutions result in the conclusion that our Constitution grants unqualified rights not subject to the vague test of reasonableness or in any way restricted as concluded by the Court.

v. **The conclusion in paragraph 213 of the reasons for judgment that 'the concern that LPP is left vulnerable, eroded or breached as a result of the power granted to the GLC under the Regime to inspect and examine documents in the possession of attorneys classified as DNFIs has not been established', is clearly erroneous since the burden of proof is on the respondents to establish that the power is demonstrably justified in a free and democratic society**.

w. The Full Court erred in its conclusion (paragraph 213) that it has not been established that under the Regime the power to inspect and examine documents in the possession of attorneys-at-law classified as DNFIs leaves LPP vulnerable, eroded or breached, since:

i. the finding is not supported by the evidence, and is contrary to the evidence;

ii. the Full Court failed to appreciate that the burden of proof rest on the Respondents to prove 'by steps of reasoning which admit of no doubt', that the power to inspect and examine document is demonstrably justified in a free and democratic society.

x. The Full Court erred in its conclusion (paragraph 198) that the fact that in Jamaica the access is by the professional regulatory body of the Appellant, and not a direct entry by 'state agents' is a significant factor taken into account by the Court as a safeguard that balances the objective of the Regime to combat money laundering and terrorist financing against the need to minimize and alleviate the risk of breach of LPP, since:

i. The GLC since its inception and moreso in this matter has been a state agent;

ii. it does not alleviate the impact of the POCA Regime on LPP.

y. The Full Court erred as a matter of fact and/or law in its finding and subsequent [sic] that raises doubt as to the Appellant's interest in self regulation [200]. It is unfair and unwarranted particularly having regard to the conflicting role of the regulator who is arguing to uphold a Regime that is detrimental to the interest of lawyers, their clients and the administration of justice. The GLC's Guidance is aligned to the goals of the Regime.

z. The Full Court judges erred as a matter of fact and law in finding that the disclosure, identification, verification and retention requirements of the Regime are within proper limits and satisfies the objectives of the legislation without breaching the constitutional rights of their attorneys-at-law or their clients and without causing attorneys to be in breach of their commitment to their clients' cause.

aa. The Full Court judges erred in the interpretation and application of the standard of proof under section 13(2) of the Charter. The standard of proof to be discharged by the State to prove that the breach is demonstrably justified is higher than proof beyond reasonable doubt. It is proof beyond 'any' doubt. That is what makes Jamaica's constitution unique.

i. The Full Court applied the wrong test, namely the test of proportionality, and further wrongly applied that test to the duties imposed by the POCA Regime.

bb. The Full Court erred in its concluding paragraph (365) by giving equal weight to the 'national' and the 'international' fight against money laundering in its a [sic] section 13(2) analysis of whether the 1st Respondents [sic] discharged the burden of proof.

cc. The Full Court erred as a matter of fact and/or law in the application and interpretation of section 13(2) of the Charter in that it failed to take into account that the Regime is [sic] carries risk for attorneys and their clients, is unduly burdensome and places attorneys in an impossible position:

i. The suggestion that Attorneys have been given the right to segregate and with-hold privileged documents ignores the fact that the privilege belongs to the client and not the attorney. Further the Regime provides no safeguards or machinery as to how disputes as to privilege are to be resolved and carries a risk of error in identifying privilege and the consequences to the attorney and the client that follows that error." (Emphasis as in original)

[74] The appellant seeks the following orders, among others, from this court:

"a. An order setting aside the Full Court's decision.

b. Orders that the following legislation or measures are unconstitutional insofar as they are extended to lawyers and should be struck down:

i. The Proceeds of Crime Act which was extended by reason of Proceeds of Crime (Designated Non-Financial Institution) Attorneys (Order), 2013 (DNFI Order).

ii. The Proceeds of Crime Act and the Proceeds of Crime (Money Laundering Prevention) Regulations) 2007 as extended by the (DNFI Order).

iii. The General Legal Council of Jamaica Anti-Money Laundering Guidance for the Legal Profession that was published in The Jamaica Gazette Extraordinary of Thursday May 22, 2014, No 2.

iv. Chapter IV sections 94 and 95 of the Proceeds of Crime Act in so far as it requires attorneys-at-law to report suspicious transactions (STRs) directly to the Financial Investigations Division.

v. The amendment to The Legal Profession Act to insert section 5(3C) any regulation(s) issued or made pursuant thereto including The Legal Profession (Annual Declaration of Annual Activities) Regulations, 2014 [sic] July 10, 2014.

vi. The amendments to the Canons of the Legal Profession Act by the Legal Professions (Canons of Professional Ethics) (Amendment) Rules, 2014, 2nd July 2014 requiring the attorney to certify to the 2nd [respondent] by the 31st January 2015 whether the attorney engaged in the matters set out in the order of the 15th November 2013.

vii. The amendment to Canon IV of The Legal Profession Act (Canons of Professional Ethics) to remove the proviso that enjoined the attorney's ethical obligation to protect client confidences and permit client confidences to be revealed in compliance with the Proceeds of Crime Act. ..."

The approach to the appeal

[75] Only 26 of the major grounds were advanced. None, however, was formally abandoned. Given that there were no arguments put forward in respect of grounds (b),(c) and (s) and no order sought in relation to them, they are deemed to have been abandoned or it is taken that the court's decision is not required in respect of them.

Those grounds, therefore, do not fall within my contemplation in determining the outcome of the appeal.

[76] Given the complex and not too readily comprehensible formulation of some of the grounds of appeal, the issues that have been identified for the consideration and resolution of this court have been distilled from a combined assessment of the appellant's claim in the court below; the reasoning and decision of the Full Court; and the grounds of appeal as argued before this court.

[77] Also, in order to obtain some well-needed direction for the conduct of the analysis by this court, in the light of the extensive grounds of appeal, it must first be appreciated that what was before the Full Court was a constitutional claim relating to legislative measures, which are alleged to be unconstitutional, for breach of specific Charter rights.

[78] In considering the case on appeal, therefore, the court cannot lose sight of the incontrovertible principle that it cannot properly interfere with legislation passed by Parliament, unless it runs afoul of the Constitution. This is in keeping with the well-known separation of powers doctrine. This court's examination of the Full Court's decision, and the appellant's contention that the Regime is unconstitutional and should be struck down, must, therefore, have as its central focus, the question of whether any of the rights, alleged by the appellant to be engaged by the Regime, is being, has been or is likely to be infringed in a manner which is not demonstrably justified in a free and

democratic society. The issues raised on the appeal must, necessarily, be viewed within this context.

[79] It is against this background that the issues for consideration have been extracted and formulated for the examination of this court in determining whether the appellant is correct that the Full Court erred in its decision that the Regime is constitutional. Any failure on my part to treat with the grounds in the sequence and terms set out by the appellant in the notice of appeal is as a result of my appreciation of the key issues that were for the determination in the claim and which arise for resolution on the appeal.

[80] No disrespect is intended to the appellant's formulation of the grounds but the approach that is adopted, in treating with the appeal, is not only in the interest of brevity but for the attainment of a clearer understanding of the case that arises for resolution on appeal.

The issues

[81] The overarching issues extracted for the determination of this court in assessing whether the Full Court erred in coming to its decision that the Regime is constitutional are:

i. Whether the Full Court erred in imposing the presumption of constitutionality as the appropriate test in the context of the Charter in determining the constitutionality of the Regime (ground (d)).

ii. Whether the Full Court wrongly imposed the burden of proof on the appellant, to rebut the presumption that the Regime is constitutional, to the criminal standard of proof, that is, beyond a reasonable doubt (grounds (e) and (f)).

iii. Whether the Full Court erred in applying the wrong standard of proof in arriving at its finding that the 1st respondent had proved that the infringement of the constitutional rights of attorneys-at-law is reasonably justified in a free and democratic society (grounds (aa) and (w)(ii)).

iv. Whether the Full Court erred in its assessment and findings as to whether the Regime undermines or protects LPP (grounds (g), (h), (i), (j), (k), (l), (m), (n), (p), (r), (w), (x) and (y)).

v. Whether the Full Court erred in its finding that the Regime does not infringe regulated attorneys-at-law's (and/or) their clients' constitutional right to liberty and security of the person (grounds (h) (in part), (t) and (u)).

vi. Whether the Full Court erred in finding that the examinations conducted by the GLC do not amount to "warrantless searches" in breach of the attorney-at-law's constitutional right to protection from search of the person and property (grounds (o), (q), (v) and (w)).

vii. Whether the Full Court erred in finding that the disclosure, identification, verification and record-keeping requirements of the Regime are within proper limits and do not breach the constitutional rights of regulated attorneys-at-law and their duty of commitment to their client's cause (ground (z)).

viii. Whether the limitations on, or infringements of Charter rights by the Regime, are demonstrably justified in a free and democratic society (grounds (aa)(i), (bb), (cc) and (w)(ii)).

ix. Whether the Full Court erred or wrongly exercised its discretion in refusing to grant the orders sought in the fixed date claim form which challenged the constitutionality of the Regime (ground (a)).

The standard of review

[82] The role of this court in its review of the decision of the Full Court is a limited one. The court is not at liberty to interfere with the Full Court's decision merely because it does not agree with it. Where the decision involves pure questions of law and or mixed questions of fact and law, this court can only interfere with the decision if the Full Court applied the wrong law or was plainly wrong in its findings of fact. Where what was decided involves the exercise of the Full Court's discretion, then the decision can only be properly distrubed in the circumstances delineated in **Hadmor Productions Ltd v Hamilton** [1983] 1 AC 191 and reinforced by this court in

numerous subsequent authorities (see for instance, **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1).

Issue (i)

Whether the Full Court erred in imposing the presumption of constitutionality as the appropriate test in the context of the Charter in determining the constitutionality of the Regime (ground (d))

[83] The applicability of the presumption of constitutionality of legislative provisions within our jurisprudence has, at its core, the guidance given by Lord Diplock in **Hinds and others v The Queen** [1976] 1 All ER 353. One of the issues that arose for the consideration of the Board in that case was whether the enactment of the Gun Court Act by the Jamaican Parliament in 1974, establishing a new court to adjudicate on firearm offences, was unconstitutional. The Board held that certain provisions of the Gun Court Act were unconstitutional and therefore void. In resolving the question as to the constitutionality of certain impugned aspects of that Act, Lord Diplock, at pages 368 and 369, reasoned:

> "...By s 48(1) of the Constitution the power to make laws for the peace, order and good government of Jamaica is vested in Parliament; and prima facie it is for Parliament to decide what is or is not reasonably required in the interests of public safety or public order. ...
>
> In considering the constitutionality of the provisions of s 13(1) of the 1974 Act, a court should start with the presumption that the circumstances existing in Jamaica are such that hearings in camera are reasonably required in the interests of 'public safety, public order or the protection of the private lives of persons concerned in the proceedings'. The presumption is rebuttable. Parliament cannot evade a constitutional restriction by a colourable device *(Ladore v Bennett* ([1939] 3 All ER 98 at 105, [1939] AC 468 at 482)).

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

[84] Relying on the views expressed by Peter W Hogg in the text, Constitutional Law of Canada, Fifth edition, Volume 2, Mr Richard Mahfood QC, contended, on behalf of the appellant, that it is necessary for there to be a shift in the application of the **Hinds** principle, as, in that case, the Board was being asked to interpret a different constitutional instrument. He submitted that the current test to be applied, in determining the issue of constitutionality, is a two-stage approach, similar to that utilised by the courts in Canada and New Zealand, which have similar provisions to the Charter.

[85] Section 13(1) and (2) of the Charter provide that:

> "13.-(1) Whereas -
>
> (a) the state has an obligation to promote universal respect for, and observance of, human rights and freedoms;
>
> (b) all persons in Jamaica are entitled to preserve for themselves and future generations the fundamental rights and freedoms to which they are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society; and
>
> (c) all persons are under a responsibility to respect and uphold the rights of others recognized in this Chapter, the following provisions of this Chapter shall have

effect for the purpose of affording protection to the rights and freedoms of persons as set out in those provisions, to the extent that those rights and freedoms do not prejudice the rights and freedoms of others.

(2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, **and save only as may be demonstrably justified in a free and democratic society** –

(a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and

(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights." (Emphasis added)

[86] Section 1 of the Canadian Charter of Rights and Freedoms ("the Canadian Charter") reads as follows:

"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**." (Emphasis added)

[87] The corresponding provision of the New Zealand Bill of Rights Act, section 5, reads:

"5 **Justified Limitations**

Subject to section 4, the rights and freedoms contained in this Bill of Rights may **be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society**." (Emphasis added)

[88] Mr Mahfood, in advancing his argument that the presumption of constitutionality is no longer applicable within the context of the Charter, relied on this extract from Professor Peter W Hogg's article at page 120:

> "In Charter cases, the constitutional contest is between a government and an individual, who asserts that a right has been violated. In that context, it is not appropriate to tilt the scale in favour of government. There should be no special obstacles placed in the way of an individual who seeks to vindicate a Charter right. In Charter cases, therefore, there is no presumption of constitutionality, except in the third sense indicated above, namely, reading down. There is no derogation of individual rights if the individual wins through a reading down as opposed to a holding of invalidity. …
>
> With respect to evidence in Charter cases, in the stage-one inquiry into whether the law infringes a Charter right, the burden of proof does rest on the individual asserting the infringement. That, however, is simply a consequence of the rule of civil procedure that 'the one who asserts must prove'. The burden of proof is the normal civil one, uncomplicated by any doctrine that the government need have only a 'rational basis' for its legislation. Once the stage-one inquiry has been answered yes, there is no presumption that the law is a reasonable limit that can be demonstrably justified in a free and democratic society. On the contrary, the burden is on the government to prove that the elements of s 1 justification are present."

[89] Learned Queen's Counsel further grounded his argument by referencing the article, Limiting Rights [2002] VUWLawRw 22, by Andrew S Butler, where, in speaking of the similar provision in the New Zealand Bill of Rights Act, the learned writer stated, in part, at page 543:

> "...The two-stage process comports well with the allocation of burdens of proof envisaged by section 5 [of the New Zealand Bill of Rights Act]. It naturally results in the plaintiff having to indicate that a *prima facie* interference with a Part

> II right or freedom has occurred ('he or she who alleges bears the burden of proving'), while at the second stage the onus shifts to the State to 'demonstrably' justify the limits it has placed on that right or freedom..."

[90] Mr Mahfood, on the basis of the foregoing viewpoints regarding the presumption of constitutionality in Charter cases, contended that the Full Court would have erred as a matter of law when it found that there was a presumption of constitutionality in the interpretation of the Charter.

[91] In treating with the issue of the constitutionality of the Regime, the Full Court embarked on a comparative review of the Jamaican and Canadian Charters. It noted that, although there were similarities with the Jamaican Charter, the Canadian Charter is worded slightly differently. Having noted this distinction, the Full Court reasoned at paragraphs [51] to [54] of its judgment:

> "[51] As noted in **Gerville Williams** whether, given the passage of a new Charter, the **Oakes** formulation or a version thereof will need to replace the pre-existing standard presumption of constitutionality test, is yet to be definitively decided in this jurisdiction. As in **Gerville Williams** therefore, the approach of this court will be to start from the presumption of constitutionality, but in light of the clear similarities between the Canadian and Jamaican Charters, to also examine whether or not the impugned aspects of the Regime satisfy the **Oakes** test of constitutionality.
>
> [52] While it is true that the Jamaican Charter does not contain the words 'within the reasonable limits prescribed by law' it would seem that the very concept of demonstrably justifiability would of necessity embrace some notion of proportionality. Once rights are not absolute there has to be some exercise involving balancing any limitation of, or derogation from such rights, against the reason(s) for the interference. Inherent in that exercise must be a consideration of the issue of proportionality.

> [53] Before proceeding to deal with the substantive issues identified it will be useful to consider the appropriate approach in determining the limitations on rights permitted by the derogation clause in section 13 (2) of the Charter. The [appellant] referred the court to the article **Limiting Rights** by Andrew S Butler in which he examined how a similar derogation clause in section 5 of the **New Zealand Bill of Rights Act** 1990 should be interpreted. He noted at page 541 that limitation on rights could involve either 'definitional balancing' or 'ad hoc balancing'. He explained that 'definitional balancing would involve reading limitations into the definition of the right set out' while 'ad hoc balancing would require the court to define the rights broadly 'without reference to competing values or other considerations', with questions as to the reasonableness of limitations on those broad rights being determined separately...'
>
> [54] Two of the reasons Butler preferred the ad hoc balancing approach were:
>
> i) that the two stage process where the broad right was outlined and then the reasonableness of any limitations were considered, 'comports well with the allocation of burdens of proof...It naturally results in the plaintiff having to indicate that a prima facie interference with a ...right or freedom has occurred ('he or she who alleges bears the burden of proving'), while at the second stage the onus shifts to the State to 'demonstrably' justify the limits it has placed on that right or freedom.'; and
>
> ii) it 'ensures clearer, more transparent analysis, very important where difficult social policy issues are involved...' " (Emphasis as in original)

[92] The Full Court then concluded at paragraph [55]:

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

[93] Having accepted the approach recommended by Andrew S Butler, the Full Court, at paragraph [56] then had regard to the approach recommended in the Zimbabwean case of **Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation, Attorney General intervening** [1996] 4 LRC 489. It noted that this approach is compatible with that advocated by Andrew S Butler and duly had regard to the three criteria put forward in **Retrofit** for the determination of the question of, "...whether an abrogation or restriction of a fundamental right was permissible in a democratic state".

[94] Mr Mahfood contended that the correct approach to be adopted, in treating with section 13(2) of the Charter, is, firstly, to establish, on a balance of probabilities, that an "apparent" or "prima facie" case of breach exists and that having been so established, the onus shifts to the state to demonstrably justify the limits it has placed on that right or freedom.

[95] Mrs Nicole Foster-Pusey QC ("the Solicitor-General", as she then was), in her response on behalf of the 1st respondent, did not agree with this proposition. She regarded the appellant's contention that the court ought not to adopt the presumption of constitutionality, when examining legislative provisions being challenged in the context of the Charter, as being, "misguided and does not take into account established judicial precedent on [the] issue". The learned Solicitor-General submitted that **Hinds** made it patently clear that when a fundamental right is in question, irrespective of the section of the Constitution that an Act of Parliament is said to impugn, a rebuttable presumption of constitutionality is applicable.

[96] The learned Solicitor-General argued that the very fact of the amendment to the Constitution, without more, does not sufficiently justify a different approach being adopted, when examining whether the Regime contravened the Constitution, unless the wording indicated that a different approach was required. Relying on the case of **Arorangi Timberland Limited and others (Appellants) v Minister of the Cook Islands National Superannuation Fund (Respondent) (Cook Islands)** [2016] UKPC 32, she implored this court to find that the Full Court was correct in law in applying the presumption of constitutionality.

[97] The GLC, in response, contended that the arguments of the appellant with respect to the Full Court's approach, in determining the constitutionality of the Regime, were "mischaracterized". This was in the light of the fact that the Full Court, in its determination of the Regime's constitutionality, had reviewed all the authorities relating to the presumption, and correctly concluded that they pre-dated the Charter.

[98] The GLC agreed with the appellant, however, that the Charter "requires a court to apply a new approach [in] determining the constitutionality of proposed legislation". This, it maintained, is the correct approach in assessing the constitutionality of the Regime, and so, in cases where a legislation is deemed to have limited or abrogated fundamental rights, it may now be "constitutional if it can be shown that the limit or restriction is demonstrably justified in a free and democratic society". The submissions of the GLC on this point were rooted in dicta from the Canadian case of **R v Oakes** [1986] 1 SCR 103 and **Retrofit**, which were cited on its behalf.

[99] In **R v Oakes**, Dickson CJ, in treating with the meaning and effect of section 1 of the Canadian Charter, stated at page 105:

> "Section 1 of the Charter has two functions: First, it guarantees the rights and freedoms set out in the provisions which follow it; and second, it states explicitly the exclusive justificatory criteria (outside of s 33 of the *Constitutional Act*, 1982) against which limitations on those rights and freedoms may be measured.
>
> **The onus of proving that a limitation on any Charter right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. Limits on constitutionally guaranteed rights are clearly exceptions to the general guarantee. The presumption is that Charter rights are guaranteed unless the party invoking s 1 can bring itself within the exceptional criteria justifying their being limited**." (Emphasis added)

[100] The learned Chief Justice went on to outline the approach that ought to be taken and the criteria that should be satisfied in establishing justification in accordance with section 1 of the Canadian Charter (see pages 138-140 of the report).

[101] Dr Lloyd Barnett, in his oral submissions on behalf of the GLC, noted that in the light of these authorities, and the wording of section 13(2) of the Charter, it would not be correct to say that the starting point would have been for the Regime to be presumed constitutional. However, contrary to the submissions of Mr Mahfood, he maintained that the approach recommended in **R v Oakes** ("the **Oakes** test") and **Retrofit** had been adopted by the Full Court in its assessment of the Regime. Dr Barnett referred the court to paragraph [359] of the judgment of the Full Court, and noted that the court had found that the appellant had successfully established that the

Regime had, in fact, interfered with the privacy rights of regulated attorneys-at-law, but concluded that any such infringement was demonstrably justified in a free and democratic society. He maintained that the Full Court had arrived at its decision having applied the methodology proposed by Gubbay CJ in **Retrofit**. Accordingly, Dr Barnett contended that the decision of the Full Court could not be impugned, it having not applied the test of the presumption of constitutionality to the Regime.

Analysis and findings

[102] The Full Court correctly noted that the Charter as presently worded has given rise to the consideration of whether there needs to be some departure from the presumption of constitutionality of legislative provisions. It, nevertheless, proceeded to apply the presumption as the starting point in its analysis.

[103] It is important to this analysis to establish what is meant by the presumption of constitutionality in order to determine its proper place in the evolving jurisprudence surrounding the Charter. In determining the function of the presumption of constitutionality, a useful starting point is to first establish what is the role of a presumption, generally, in the context of the law.

[104] The learned authors, Adrian Keane and Paul McKeown, explained in their text, The Modern Law of Evidence, 9th edition, at page 652, that where a presumption operates, a certain conclusion may or must be drawn by the court in the absence of evidence in rebuttal. The effect of this is to assist a party bearing a burden of proof, the degree of assistance varying from presumption to presumption. The party relying on

the presumption bears the burden of establishing the basic facts and once he has adduced sufficient evidence on that fact, his adversary bears the legal burden of disproving the presumed fact.

[105] Francis Alexis in his text, Changing Caribbean Constitutions, 2nd edition, 2015, at pages 242-243, paragraph 9.94, helpfully opined that, "analytically, arguably, even if not articulated judicially, the presumption of constitutionality is an amalgam of the following principles:

i. Parliament is presumed to intend to act consistently with, not in contravention of the Constitution, out of due respect for the Constitution as the supreme law.

ii. Parliament is to be taken as not intending to confer arbitrary powers.

iii. Parliament is assumed to intend to act consistently with, not repugnantly to, the rule of law, "in accordance with Government under law, which is a foremost foundation of the law and the Constitution".

[106] In **de Freitas v The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and Others (Antigua and Barbuda)** [1998] UKPC 30, the Privy Council, in examining the decision of the Court of Appeal of Antigua and Barbuda, revisited the circumstances in which the presumption of constitutionality

ought properly to be applied in determining the constitutionality of a statutory provision. At paragraph 17 of the judgment, their Lordships cited the dictum of Lord Diplock in **Attorney-General of the Gambia v Momodou Jobe** [1984] AC 689, in which he explained the presumption of constitutionality at page 702 in these terms:

> "…[The presumption of constitutionality] is but a particular application of the canon of construction embodied in the Latin maxim *magis est ut res valeat quam pereat* which is an aid to the resolution of any ambiguities or obscurities in the actual words used in any document that is manifestly intended by its makers to create legal rights or obligations."

[107] Tracy Robinson, Arif Bulkan and Adrian Saunders, in their text, Fundamentals of Caribbean Constitutional Law, 2015, at page 170, paragraph 3-031, have described the presumption of constitutionality as "a form of judicial restraint or deference exercised by superior courts in reviewing legislation". According to the learned authors, it is self-imposed because the ordinary function of judges is to interpret and apply laws, not to question them. Therefore, the essence of the presumption, they opined, is that the judiciary should be slow to interfere with laws properly enacted by Parliament, and so, it does this by "making 'an initial presumption that Parliament did not intend to pass beyond constitutional bounds"'.

[108] I have examined other authorities treating with the presumption of constitutionality, given the divergent views between the parties as to its application in the context of this case. Having done so, I find that I am impelled to endorse the views of Tracy Robinson, in her article, The Presumption of Constitutionality (2012) 37 WILJ 1-24, where she stated at pages 1 and 2:

> "It is 'trite' to say there is a presumption of constitutionality and yet it is still unclear what this presumption means. In this article I review and try to make sense of nearly fifty years of case-law on this question in the Caribbean. I conclude that the presumption in favour of the constitutionality of a challenged law has two quite divergent implications in Caribbean Constitutional law: one as an allocation of the *burden* of proving elements required to establish the law is unconstitutional and the other as a *canon of construction* applied in the interpretation of a law that is in jeopardy of being declared to be unconstitutional. The first sense of the presumption-as a burden of proof- has been inflated and misunderstood, while the second-as a canon of construction – is underappreciated.
>
> ...
>
> The more widely accepted understanding of the presumption of constitutionality is as a burden of proof. The presumption has the consequence that the burden rests with the applicant to show a 'clear transgression of constitutional principles'.
>
> ...
>
> There is a momentous caveat to the burden. Once the applicant establishes that the law in question *prima facie* infringes a guaranteed fundamental right, the applicant is deemed to have met this burden of establishing a clear transgression of constitutional principles. The burden then shifts to the respondent to establish that the limit on the right can be constitutionally justified. This is because the courts have a duty to interpret the fundamental rights guaranteed by the constitutions generously to give full effect to the rights."

[109] Whatever meaning may be ascribed to the presumption of constitutionality, one thing that is constant is that it conveys the caveat that the judiciary must be slow to interfere with laws validly promulgated by Parliament. It should be noted that in the context of this case, and treating with the issue under consideration, the concern is with its implications for the allocation of the burden of proof in Charter cases. This

focus has resulted from the manner in which it was applied by the Full Court, which is at the centre of controversy in this case. The Full Court, in declaring it to be the starting point in its approach in determining the issue of the constitutionality of the Regime, had engaged it in allocating the burden of proof.

[110] Section 13(2) of the Charter, like section 1 of the Canadian Charter and section 5 of the New Zealand Bill of Rights Act, allocates the burden of proof in Charter cases. I accept the views of Andrew S Butler that the phrase used in the respective sections of the different Charters, "save as is demonstrably justified" suggests that the party seeking to uphold a limit upon a right as being justified will bear the burden of proving it. As Andrew S Butler put it, speaking within the context of the New Zealand Bill of Rights Act:

> "...[T]he purpose of section 5 is to affirm that the [New Zealand Bill of Rights Act] is intended to create a 'culture of justification'."

The same may be said of section 13(2) of the Charter.

[111] The Full Court did not see it fit to depart from the presumption of constitutionality test but rather to start with it at the forefront of its consideration of the burden of proof and then to amalgamate it with the **Oakes** test. In fact, in treating with the powers conferred on the GLC, it did invoke components of the presumption of constitutionality. It concluded at paragraph [187] of the judgment that there is a presumption that the GLC, in exercising its statutory mandate, will act in a manner which accords with, rather than derogates from, the fundamental rights enshrined in

the Constitution. It further stated that it is also to be presumed that adherence to the principle of legality was the intention of Parliament when it granted powers to competent authorities. This, among other things, led it to a conclusion that there was no engagement of the right to be protected from search, guaranteed by section 13(3)(j)(i) of the Charter.

[112] At the time the Full Court invoked these presumptions, in treating with the impugned sections of the POCA, it did not express the view that there was any ambiguity or obscurity in the provisions that were for consideration. It seems, however, that it invoked the presumption of constitutionality as a canon of construction in relation to a breach of section 13(3)(j)(i) by section 91A(2)(c). The GLC's contention, therefore, that the Full Court did not apply the presumption of constitutionality test is not, at all, entirely correct as there is clear and incontrovertible evidence that it did so.

[113] Whatever use was made of the presumption by the Full Court in its analysis of section 13(3)(j(i), however, it cannot be said that when it declared the approach it would take, in considering the question of the constitutionality of the Regime, as detailed at paragraphs [51] to [55] of the judgment, it engaged the presumption as an aid to construction. At that juncture, it was not construing any particular provision of the Regime that was found to be ambiguous or obscured, which would have required an aid to construction in the form of the presumption of constitutionality. It follows then, and it is, indeed, clear that the Full Court did not engage the presumption only as

an aid to construction but rather to allocate the burden of proof between the appellant and the state.

[114] In my view, the presumption ought not to have been used for that purpose in the light of the unambiguous wording and intendment of sections 13(1) and (2) of the Charter. There should be no place for the presumption of constitutionality, coming to the aid of the state in the allocation of the burden of proof in a case such as this, where Charter rights are alleged to be limited by legislative measures. There is a legal onus on the state to justify an infringement, pursuant to section 13(2) of the Charter.

[115] The Constitution expressly provides for its supremacy over Parliament in section 2. In section 13(2)(b), it again, consistent with its supremacy, declares that Parliament shall pass no law and no organ of the state shall take any action to abrogate, abridge or infringe the rights it has guaranteed to every person in Jamaica. Any abrogation, abridgment or infringement, to be upheld as constitutional, must be demonstrably justified in a free and democratic society. It is, therefore, not for the aggrieved individual to show lack of justification but for the state to demonstrate justification, which ought to be measured and tested by reference to the enduring values and essential principles necessary to the survival of a free and democratic society.

[116] In **R v Oakes**, Dickson CJ put it this way:

> "64. ...The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs,

> respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. **The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.**
>
> **65. The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the Charter. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society**." (Emphasis added)

[117] Against the background of the discussion above, I do not accept the 1st respondent's submissions that this court should apply the reasoning of the Privy Council in **Arorangi Timberland Limited and others v Minister of the Cook Islands National Superannuation Fund (Cook Islands)**. In that case, the Board assessed, among other things, the presumption of constitutionality of the legislative provision under consideration and the applicable approach to proportionality. At paragraphs 29 to 32 of the judgment, the Board reasoned thus:

> "29. So far as the presumption of constitutionality is concerned, the Court of Appeal said that it had two components. The first was the principle that a court should, if possible, interpret a statute so that it does not conflict with any constitutional limitations - see *Observer Publications Ltd*

> *v Matthew* [2001] UKPC 11, para 49. The second component which the Court of Appeal identified was that '[t]he constitutionality of a Parliamentary enactment is presumed unless it is shown to be unconstitutional' - see *Public Service Appeal Board v Omar Maraj* [2010] UKPC 29, para 29.
>
> 30. The Board has no doubt but that the first component is an important and valid principle of statutory interpretation, and indeed it is included in the Constitution - see article 65. As Lord Cooke said in *Observer Publications*, para 49, legislation should, if possible, be 'read down' so as to comply with constitutional requirements. And, as Lady Hale said more recently, 'in interpreting [statutory] provisions, the Board should presume that Parliament intended to legislate for a purpose which is consistent with the fundamental rights and not in violation of them' - *Public Service Appeal Board v Omar Maraj* [2010] UKPC 29, para 29.
>
> 31. Greater circumspection is required when it comes to the second component. The Board would accept that, save perhaps in extreme circumstances, a statute should be presumed to be constitutional until it is shown to be otherwise, that (in so far as it is helpful to speak of a burden in such circumstances) the burden is on the party alleging that a statute is unconstitutional, and that any court should be circumspect before deciding that a statute is unconstitutional."

[118] It was a differently worded constitutional provision from our Charter that was under consideration in that case. That provision, namely, article 65 of the Constitution of the Cook Islands, expressly gave effect to the applicability of the presumption of constitutionality. It provided that all laws are to be construed and applied as not to abrogate or infringe a right until the contrary was established. This position has remained the orthodoxy of the law that had existed in Jamaica before the promulgation of the Charter.

[119] I am drawn into accepting the views, embraced by the appellant and the GLC, that the Charter is, in fact, an evolutive and innovative document, which requires a new approach to its interpretation. This is in line with the thinking in Canada and New Zealand, in treating with similarly worded constitutional provisions. In **Attorney-General of Manitoba v Metropolitan Stores (MTS) Ltd** [1987] 1 SCR 110, it was held that the "innovative and evolutive character of the Canadian Charter of Rights and Freedoms conflicts with the presumption of constitutional validity in its literal meaning, [which is], that a legislative provision challenged on the basis of the Charter can be presumed to be consistent with the Charter and of full force and effect". I adopt this dictum.

[120] In keeping with the letter, spirit, and intendment of the Charter, the **R v Oakes** two-stage approach seems to be more appropriate than the presumption of constitutionality approach in dealing with Charter cases.

[121] I agree with the contention of the appellant in relation to ground (d), that the Full Court erred when it began its enquiry with the presumption of constitutionality as the starting point and then proceeded to apply the **Oakes** test. The legal burden of proof as well as the evidential burden casts on the state to establish justification would serve to nullify or render nugatory the effect of any presumption that would have been raised in its favour at the outset as to constitutionality of the Regime. It would, therefore, be of no utility to raise a presumption in its favour.

[122] In accordance with the wording of sections 13(1) and (2) of the Charter and the approach advanced in **R v Oakes**, the Full Court should have begun its analysis from the starting point that the Charter guarantees the rights and freedoms, which it seeks to protect and that they should not be abrogated, abridged or infringed, unless it can be demonstrated (not merely asserted) that such abrogation, abridgement or infringement is justified in a free and democratic society. The state, therefore, has the burden to bring justification, upon proof by the appellant of abrogation, abridgement or infringement of a Charter right. This is a positive duty cast on the state to prove constitutionality.

Conclusion on issue (i)

[123] Accordingly, in my view, the correct approach, in assessing the constitutionality of a legislative provision, which is alleged to be in breach of the Charter, ought not to involve an amalgamation of the presumption of constitutionality test with the **Oakes** test. That conjoined approach does not sit well with the clear and unambiguous wording of section 13 of the Charter and the purposive approach and generous interpretation that must be applied to its language (see **Minister of Home Affairs and another v Fisher** (1979) 44 WIR 107) to give effect to the rights it guarantees. The application of the presumption of constitutionality is not consonant with the purpose of the Charter to comprehensively and effectively protect the rights and freedoms it guarantees to all individuals in Jamaica.

[124] The default position should be then that the rights are guaranteed and as a result, the state is required, by the wording of section 13(2), to affirmatively justify any

proven limitation of any of them, thereby bringing itself within the exception created by the Charter. That translates into both an evidential and legal burden cast on the state to establish constitutionality. The presumption ought not to be invoked to relieve the state of any incidence of the burden of proof in Charter cases. This is the new ethos of the Charter, which, I strongly believe, ought to guide the courts in this jurisdiction in the adjudication of Charter rights. Once again, I adopt the views of Tracy Robinson, which accords with my own, that "the presumption ought not to operate to make the constitutional protection of rights a hallow guarantee", as it did in the older cases involving the the repealed Chapter 111 (The Presumption of Constitutionality (2012) 37 WILJ 1-24, at page 2). The Charter brings with it a new dawn which ought to be reflected brightly in the courts' treatment of Charter rights. The guaranteed rights and freedoms must be taken seriously as warranted by the dictates of a free and democratic society.

[125] However, despite what may be regarded as an unacceptable feature in the approach of the Full Court in assessing the constitutionality of the Regime, by starting with the presumption of constitutionality in allocating the burden of proof, it cannot be said, on that basis alone, and without more, that its ultimate decision that the Regime is constitutional is wrong. In the end, it did apply the **Oakes** test, contended for by the appellant, in treating with the burden on the state to justify what it found to have been the proven infringement of privacy rights. The question still remains whether, by taking the approach it did, it arrived at a decision that is wrong in law. This is explored in treating with other issues in the appeal.

[126] For now, it suffices to say that the appellant succeeds on this issue. It does not, however, provide a sufficiently strong basis for this court to interfere with the decision of the Full Court that the Regime is constitutional.

Issue (ii)

Whether the Full Court wrongly imposed the burden of proof on the appellant, to rebut the presumption that the Regime is constitutional, to the criminal standard of proof, that is, beyond a reasonable doubt (grounds (e) and (f))

[127] The complaint of the appellant in grounds (e) and (f) seems justified upon an examination of the reasoning of the Full Court, and in the light of the view expressed above that the presumption of constitutionality does not fit well within the framework of the Charter and that the **Oakes** test is a better approach to the enquiry.

[128] Having concluded that the presumption of constitutionality was to be the starting point and that the burden was on the appellant to rebut it, the Full Court reasoned that the standard of proof for doing so was proof beyond a reasonable doubt. It reasoned:

> "[43] The Privy Council has also consistently declared that the test for unconstitutionality in the Commonwealth Caribbean is that which is outlined in **Hinds** - proof beyond a reasonable doubt-. (See **Mootoo v Attorney General of Trinidad and Tobago** (1979) 30 WIR 411, **Grant v R** (2006) [68] WIR 354 and **Suratt v Attorney General of Trinidad and Tobago** (2007) 71 WIR 391)." (Emphasis as in original)

[129] The Full Court accepted the views of the learned Solicitor-General who had argued before it as well as in this court that the standard of proof that is applied, in rebutting the presumption of constitutionality, is proof beyond a reasonable doubt. She

maintained that several decisions from the Privy Council, including **Mootoo v Attorney General of Trinidad and Tobago** (1979) 30 WIR 411, have confirmed that the burden of proving that a legislation is unconstitutional is a heavy one. The rationale for the imposition of a heavy burden, the learned Solicitor-General argued, was expounded upon in **The Public Service Appeal Board v Omar Maraj** [2010] UKPC 29, where it was stated at paragraph 29:

> "...In short, in interpreting these provisions, the Board should presume that Parliament intended to legislate for a purpose which is consistent with the fundamental rights and not in violation of them."

[130] Contrary to the submissions of Mr Mahfood, the learned Solicitor-General contended that the courts do not equate "proof beyond a reasonable doubt" with the criminal standard. Instead, the standard of proof that is required, she said, is that of a heavy one, which flows from the seriousness of a finding that a law passed by Parliament, is unconstitutional. Such a finding, the learned Solicitor-General maintained, "is not to be made lightly or only if a law is 'probably' in breach or 'more likely in breach than not'".

[131] Regrettably, I find it difficult to accept the submissions of the learned Solicitor-General on this point. Although the authorities relied on by the Full Court, and which she had cited, have reaffirmed the presumption of constitutionality as the appropriate test in treating with an Act of Parliament, none of them have expressly stated that the standard of proof, in establishing unconstitutionality, is the criminal standard of proof or proof beyond a reasonable doubt. Those authorities cited by the Full Court have used

the term, "the burden is a heavy one", without stating expressly that it is to the criminal standard. I am mindful, however, that there are authorities (not cited before this court by counsel) which have stated that the standard of proof is proof beyond a reasonable doubt. See, for instance the Trinidad and Tobago Court of Appeal's decision in **Attorney-General of Trinidad and Tobago v Mootoo** (1976) 28 WIR 304, 335, which was affirmed by the Privy Council (in **Mootoo v Attorney-General of Trinidad and Tobago**), without expressly stating that the standard of proof is beyond a reasonable doubt.

[132] Furthermore, the learned Solicitor-General's argument that the court does not equate "proof beyond a reasonable doubt" with the criminal standard is, with all due respect, difficult to appreciate. There are two known standards of proof recognised in our law: the criminal standard of proof beyond a reasonable doubt (which may sometimes apply to proceedings other than criminal proceedings, such as disciplinary proceedings) and the civil standard of proof, being on a balance or preponderance of probabilities.

[133] The decisions of the Privy Council, which have established that the burden is a heavy one, without expressly saying it is to the criminal standard, must be taken, at least, as being indicative of the nature and cogency of the evidence required to establish unconstitutionality of an Act of Parliament. That does not necessarily take the standard of proof to the criminal standard and outside of the civil standard. The use of the civil standard of proof is, in my view, not to be interpreted as being disregard for

the seriousness of the issue that is before the court for consideration. Even in circumstances where there are serious issues to be considered by the court in civil cases, where a criminal offence is alleged, such as fraud, it is well settled that this does not mean that the standard of proof shifts to the criminal standard (see **Hornal v Neuberger Products Ltd** [1956] 3 All ER 970).

[134] Downer JA, speaking in this court, in **Fuller (Doris) v Attorney-General of Jamaica** (1998) 56 WIR 337 at 364, 369, had stated that to rebut the presumption of constitutionality, the standard of proof was the civil standard. I see no reason to depart from that view.

[135] In any event, and even if those authorities relied on by the Full Court, implicitly, intended that the criminal standard of proof should be applied, I am impelled to agree with the authorities, which treat with similar provisions to the Charter, and which have applied the **Oakes** test. They have held that the standard of proof that is applicable in Charter cases, even where an Act of Parliament is the subject matter of the complaint, is the civil standard of proof. In **R v Oakes**, for instance, Dickson CJ put it this way:

> "67. The standard of proof under s 1 is the civil standard, namely, proof by a preponderance of probability. The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous on the party seeking to limit. Concepts such as 'reasonableness', 'justifiability' and 'free and democratic society' are simply not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously. Indeed, the phrase 'demonstrably justified' in s 1 of the Charter supports this conclusion. Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case: see

Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto: 1974), at p 385. As Lord Denning explained in *Bater v Bater*, [1950] 2 All ER 458 (CA), at p 459:

> 'The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.'

This passage was cited with approval in *Hanes v Wawanesa Mutual Insurance Co*, [1963] SCR 154, at p 161. A similar approach was put forward by Cartwright J in *Smith v Smith*, [1952] 2 SCR 312, at pp 331-32:

> 'I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend on the totality of the circumstances on which its judgment is formed including the gravity of the consequences....'

68. Having regard to the fact that s 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be, in the words of Lord Denning, 'commensurate with the occasion'. Where evidence is required in order to prove the constituent elements of a s 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit. ..."

Conclusion on issue (ii)

[136] I would adopt the position that the civil standard is the applicable standard of proof in Charter cases, which must be applied at all stages of the enquiry. The evidence

required to establish the requisite degree of probability must be 'commensurate with the occasion' and so, once a Charter right is infringed, the preponderance of the probabilities test should be applied rigorously when section 13(2) is invoked for the purpose of justifying its infringement. The more serious the infringement, the greater the evidence required for justification. No heavier burden should be placed on the individual than on the state.

[137] In the light of the foregoing, the Full Court would have erred in placing the burden on the appellant to rebut the presumption of constitutionality and to do so beyond a reasonable doubt. By so doing, it would have placed the appellant in a more disadvantageous position vis-à-vis the state in establishing that the constitutionally guaranteed rights of the regulated attorneys-at-law have been infringed, while imposing a lighter burden on the state to prove justification by an application of the **Oakes** test. This would not be in keeping with the obvious intent and objective of the Charter, that is, to provide more comprehensive and effective protection for the fundamental rights and freedoms of all persons in Jamaica.

[138] I conclude, therefore, that there is merit in the appellant's complaint in grounds (e) and (f). This finding, however, is not of itself sufficient to resolve the appeal in favour of the appellant because the Full Court did find that a breach was made out by the appellant in relation to the rights to privacy under section 13(3)(j)(ii) and (iii). Where no breach was found, the issue was not expressly resolved by reference to the standard of proof. It seems fair to say then that this error complained of in grounds of

appeal (e) and (f) did not materially inform the outcome of the case and so would not without more, be fatal to the ultimate decision of the Full Court that the Regime is constitutional.

Issue (iii)

Whether the Full Court erred in applying the wrong standard of proof in arriving at its finding that the 1st respondent had proved that the infringement of the constitutional rights of attorneys-at-law is reasonably justified in a free and democratic society (grounds (aa) and (w)(ii))

[139] There is nothing arising from the reasoning of the Full Court that lends credence to the appellant's complaint in grounds of appeal (aa) and (w)(ii) that it had applied the wrong standard of proof in relation to the 1st respondent's duty under section 13(2) to prove that breach of the Charter rights is demonstrably justified. The Full Court had applied the **R v Oakes** approach to the issue of justification, and so, it could be safely assumed that it had applied the civil standard of proof, in accordance with those authorities. In any event, if it did not do so, the reasoning is silent as to the standard of proof it had applied.

[140] Mr Mahfood's argument is that the standard of proof for the state to discharge its burden to prove justification is higher than proof beyond a reasonable doubt and is proof beyond "any" doubt. Without any need for deeper analysis, it can safely be said, with all due respect, that this argument has no merit.

[141] It has already been established in relation to grounds (e) and (f), in treating with the applicable standard of proof to this case, that regardless of who bears the burden of proof, the standard of proof is the civil standard. There is no third standard of proof

recognised in law of, "proof beyond any doubt" or any other. It cannot be stated that the Full Court, by failing to apply such a standard, would have erred in law.

[142] These grounds of appeal, therefore, fail.

Issue (iv)

Whether the Full Court erred in its assessment and findings as to whether the Regime undermines or protects LPP (grounds (g), (h), (i), (j), (k), (l), (m), (n), (p), (r), (w), (x) and (y))

[143] The appellant has taken issue with some aspects of the monitoring functions of the GLC as well as the identification and transaction verification, record-keeping, risk assessment and disclosure obligations of regulated attorneys-at-law under the Regime.

[144] In its effort to make out the claim of unconstitutionality of these aspects of the Regime, the appellant has placed the principle of LPP at the fulcrum of its case. Before considering the appellant's contention that the Regime adversely affects LPP, thereby rendering it unconstitutional, it is considered useful to provide an overview of some of the more prominent aspects of the legislative measures, which have resulted in the appellant's challenge to the Regime on the ground of its alleged adverse effect on LPP.

(a) <u>The monitoring functions of the GLC</u>

[145] The POCA sets out the overarching function of the GLC as a competent authority in this provision:

> "91A.– (1) In addition to any other functions of a competent authority under this Part, and without prejudice to any other functions which that competent authority may exercise under any other enactment, a competent authority shall

exercise the functions set out in subsection (2) for the purpose of ensuring that any business in the regulated sector which that competent authority is responsible for monitoring operates in compliance with this Act and any regulations made under this Act."

[146] Sections 91A(2) and (3) of the POCA then follow by making specific provisions for the functions of the competent authority. These provisions read, in part, as follows:

"(2) A competent authority -

(a) shall establish such measures as it thinks fit, including carrying out, or directing a third party to carry out, such inspections or such verification procedures as may be necessary;

(b) may issue directions to any of the businesses concerned; and the directions may require the business to take measures for the prevention or detection of, or reducing the risk of, money laundering or terrorist financing;

(c) may examine and take copies of information or documents in the possession or control of any of the businesses concerned, and relating to the operations of that business;

(d) may share information, pertaining to any examination conducted by it under this section, with another competent authority, a supervisory authority or the designated authority, or an authority in another jurisdiction exercising functions analogous to those of any of the aforementioned authorities-

(i) other than information which is protected from disclosure under this Act or any other law; and

(ii) subject to any terms, conditions or undertakings which it thinks fit in order to prevent disclosure of the kind referred to in sub-paragraph (i) and secure against the compromising or obstruction of any investigation in relation to an offence under this Part or any other law;

> (e) may require the businesses concerned, in accordance with such procedures as it may establish by notice in writing to those businesses-
>
> > (i) if a registration requirement does not already exist under any other law, to register with the competent authority such particulars as may be prescribed; and
> >
> > (ii) to make such reports to the competent authority in respect of such matters as may be specified in the notice.
>
> (3) Nothing in subsection (2)(c) shall be construed as requiring an attorney-at-law to disclose any information or advice that is subject to legal professional privilege."

[147] As is seen, the POCA permits the GLC, to, among other things, carry out necessary examinations and verification procedures as well as to examine and take copies of information or documents in the possession or control of regulated attorneys-at-law and relating to the operations of their business. The GLC is also authorised to share information, pertaining to such examinations, with certain specified third party agents, including those of foreign states.

[148] An exemption is extended to the disclosing of information or advice, which is subject to LPP. LPP is, however, expressly prohibited from being claimed in respect of any document, information or other matter, which was given or communicated with the intention of furthering a criminal purpose (section 91A(4)).

[149] In addition to the provisions of the POCA, the GLC Guidance makes provision for compliance with the requirements of the Regime. In paragraph 14, it stipulates that the terms in the DNFI Order are to be interpreted broadly and are intended to encompass all services provided by regulated attorneys-at-law, including assisting in the planning

or execution of any of the transactions covered by the DNFI Order, from the time the regulated attorney-at-law is first engaged or consulted by or on behalf of a client.

[150] Paragraphs 16, 17 and 18, make provision for the carrying out of the functions of the GLC, having regard to the place of LPP in the attorney-at-law/client relationship. Paragraph 16 states that LPP is a "cardinal legal right available to clients of attorneys and [that] LPP is generally preserved and available under the POCA". It provides, however, that although regulated attorneys-at-law owe a duty of confidentiality to their clients, this is subject to their legal obligations under the POCA.

[151] The GLC Guidance references paragraphs IV(t)(iii) to (v) of the Canons, and sets out certain exceptions to regulated attorneys-at-law's duty of confidentiality, making it permissible for them to disclose to the appropriate authority, client information (including secrets) in the following circumstances:

i. in accordance with the provisions of the POCA and any regulations made under that Act;

ii. in accordance with the provisions of the Terrorism Prevention Act and any regulations made under that Act; or

iii. where the attorney-at-law is required by law to disclose knowledge of all material facts relating to a serious offence that has been committed.

[152] It is against this background that paragraph 18 of the GLC Guidance provides that the files of regulated attorneys-at-law are subject to periodic examination by the GLC and that the regulated attorneys-at-law will be required to disclose information and documents relating to activities within the scope of the DNFI Order to the agents of the competent or designated authority. The GLC Guidance provides further, in paragraph 54, that these documents and information, having been examined by the GLC, may be copied and shared with another competent authority, the supervisory authority, the designated authority, or an authority in another jurisdiction, exercising functions analogous to those of any of the authorities listed above, provided they are not protected from disclosure under the POCA or any other law. This reflects the provisions of subsections 91A(3)(d) and (4) of the POCA.

[153] There are four types of examinations that may be undertaken by the GLC, namely, routine biennial examinations; follow-up examinations; random examinations and special examinations (see paragraph 48 of the GLC Guidance).

[154] Routine examinations are designed to test and evaluate compliance with the Regime with focus on certain specified matters. Follow-up examinations are to address any inadequacies identified in the routine examinations. In respect of random examinations the GLC, whenever it thinks fit, and upon giving two weeks' notice, may conduct this examination. The GLC Guidance is silent as to what this examination may include. As it relates to the special examinations, these are to be conducted in circumstances where the GLC has cause to be concerned about the compliance of

regulated attorney-at-law with the Regime and where it has cause to believe that an attorney-at-law is providing designated activities but has declared otherwise in the requisite annual declaration.

[155] The GLC Guidance warns regulated attorneys-at-law against inadvertently disclosing documents and information to which LPP applies. It further recommends that documents or other information, to which LPP attaches, should be segregated from documents or information, which are to be made available for disclosure and examination.

[156] The failure of regulated attorneys-at-law to comply with any directives or requirements of the GLC constitutes a criminal offence (see section 91A(5) of the POCA).

[157] The GLC Guidance further provides that where a regulated attorney-at-law is convicted of the offence of failing to comply with any requirements or directives issued by the GLC, the conviction for the offence is deemed to be grounds on which he may be suspended or prohibited from practising.

(b) <u>The obligations of regulated attorneys-at-law</u>

[158] The Regime requires regulated attorneys-at-law to establish and implement programmes, policies, procedures and controls as may be necessary for preventing and/or detecting money laundering and/or assessing the risk of money laundering (see regulation 5(1) of the Regulations). Accordingly, regulated attorneys-at law are required to establish programmes to, among other things, ensure high standards of integrity of

employees, which include training. In relation to dealings with clients or in their conduct of other business relationships, the Regulations provide that regulated attorneys-at-law are required to maintain:

i. identification and transaction verification procedures in accordance with regulations 7 and 11;

ii. record-keeping procedures in accordance with regulation 14;

iii. risk assessment obligations in accordance with regulation 7A; and

iv. procedures for internal/external reporting in accordance with regulation 15 and sections 94 and 95 of the POCA.

(i) Identification and transaction verification obligations

[159] Persons entering into business relationships with regulated attorneys-at-law are required to provide satisfactory evidence of their identity. Regulated attorneys-at-law are then required to take measures to verify the client's identity in relation to transactions of a value of US$250.00 or more (or its equivalent in any other currency), unless the nature of the transaction is suspicious (see regulation 8(1)).

[160] Regulation 7 as well as paragraph 34.1.1 of the GLC Guidance stipulates that a valid, current picture identification be requested from such persons for business. This may include for example, a driver's licence, a passport or a Jamaican elector registration identification card. Regulated attorneys-at-law are also required to verify

the permanent address and employment details of such persons from an independent source. If the identification cannot be verified, the attorney-at-law is precluded from proceeding any further with the transaction or the particular business relationship in question (see regulation 7(1)(b)).

[161] In relation to transaction verification procedures, regulated attorneys-at-law are required to take such measures, as are necessary, to produce satisfactory evidence as to the purpose and intended nature of the business relationship or one-off transaction in certain specified circumstances, which include suspicious transaction reporting (see regulation 7(2)). Where there is no satisfactory evidence to verify the transaction, the business relationship or transaction is also not to proceed any further.

(ii) Record-keeping obligations

[162] Regulation 14 provides, among other things, that the record of a person's identity, which has been produced to the regulated attorney-at-law, in keeping with the requirements of the Regime, be kept. In relation to all relevant financial business, a record of each transaction is also to be kept for a period of seven years in a manner and form as shall facilitate the reconstruction of the transaction and the provision of information to the FID or the GLC.

[163] It is important to note that since the hearing of this appeal, regulation 14 has been amended to further require regulated attorneys-at-law to keep all correspondence and analysis, undertaken in relation to each transaction and business relationship, for the same period to facilitate provision of information to the FID or the GLC.

[164] Regulation 7(1)(c) stipulates that information provided by clients or other persons for business is to be updated at least once in every seven years during the course of the business relationship. Whenever there is doubt as to the veracity and/or adequacy of previously obtained information, and where the information is not updated as required, the business relationship should not proceed any further. Whenever there is any doubt about the veracity and/or adequacy of previously obtained information, the regulated attorney-at-law shall make an assessment as to whether any disclosure is required under sections 94 and 95 of the POCA (suspicious transaction report).

(iii) Risk assessment obligations

[165] Pursuant to regulation 7A of the Regulations and paragraph 29 of the GLC Guidance, regulated attorneys-at-law are required, as far as is reasonably practicable, to implement know your client policies and procedures, whether client-related or not.

[166] Regulated attorneys-at-law are also required to adopt a risk-based approach for assessing and managing the risk posed by money laundering and the financing of terrorist activity. This approach involves the identification, categorisation and mitigation of risks. To this end, they are required to establish a risk-profile regarding their operations, generally, and a risk-profile regarding all business relationships and one-off transactions.

(iv) Internal /external reporting and disclosure obligations

[167] Sections 94 and 95 of the POCA encompass the core reporting or disclosure obligations of regulated attorneys-at-law under the Regime. These sections provide that

all persons who are employed to firms, within the regulated sector, are required to make internal reports to their nominated officer, where they have knowledge or belief or there exists reasonable grounds for them to know or believe that a person may be involved in money laundering (see also, regulation 15 of the Regulations). The nominated officer, is an officer who performs management functions in the regulated business and who is responsible for the implementation of the programmes, policies, procedures and controls, including the reporting of suspicious transactions under the Regime. Upon receiving information of suspected money laundering, the nominated officer is required to make an external report to the FID, within 15 days of receiving the report.

[168] Section 94(4) of the POCA stipulates that for the purposes of reporting suspicious transactions, regulated attorneys-at-law are to pay attention to all complex, unusual or large business transactions carried out by their clients as well as unusual patterns of transactions, whether completed or not, which appear to be inconsistent with their normal transactions. Paragraph 24.5 of the GLC Guidance reiterates that an unusual transaction, which may give rise to a suspicious transaction report, may include, but is not limited to, a transaction "which is inconsistent with the customer's known legitimate business or source of funds".

[169] No offence is committed if the information or other matter giving rise to knowledge or belief, comes to a regulated attorney-at-law in privileged circumstances (see section 94 of the POCA and paragraph 24.9 of the GLC Guidance).

[170] Sections 97 and 98 of the POCA make it an offence for regulated attorneys-at-law to disclose information that is likely to prejudice an investigation in certain specified circumstance (tipping off). As such, once a suspicious transaction report is made to the nominated officer or the FID, it becomes an offence for the fact of that disclosure to be made known to a third party, which includes the clients or their representatives.

[171] Given the obligations of disclosure imposed on regulated attorneys-at-law by the POCA, they may now reveal the confidences or secrets of their clients in accordance with the POCA and its statutory scheme.

[172] It is clear from the foregoing provisions of the Regime that the inclusion of attorneys-at-law as a group to be regulated for the purposes of the efficacy of the AML/CFT measures has imposed far more obligations on them than was previously the case. It is also indisputable that the Regime has significant implications for regulated attorneys-at-law, in particular, as it intrudes upon communication between them and their clients as well as, generally, upon their autonomy in their business operations and business relationships.

[173] It is, therefore useful, in examining the appellant's challenge to the constitutionality of the foregoing provisions of the Regime, to first place LPP in its proper legal context.

(c) LPP - the legal framework

[174] LPP prohibits attorneys-at-law from disclosing information obtained from their clients to third parties, relating to particular matters and in certain circumstances. LPP enables a client to maintain the confidentiality of:

i. communications between him and his attorney-at-law made for the purpose of obtaining and giving legal advice (legal advice privilege);

ii. communications between him or his lawyer and third parties, the dominant purpose of which is in preparation for contemplated or pending litigation (litigation privilege); and

iii. items enclosed with or referred to in such communications and brought into existence for the purpose of obtaining legal advice.

Communication made or items held to further a criminal purpose are not subject to LPP.

[175] The most important value of LPP is to protect the confidentiality of the attorney-at-law/client relationship. It is a privilege enjoyed by the parties to such a relationship but it is, primarily, for the benefit of the client rather than that of his attorney-at-law. The attorney-at-law is only the gatekeeper of the client's confidences, and so, the confidential information, which enjoys the privilege, may only be properly disclosed with

the client's consent. Therefore, disclosure of privileged information, as a general rule, should and can only properly be made if the client chooses to waive his privilege.

[176] There is no question that LPP is a fundamental principle of the common law and one deeply embedded in our legal system. The authorities have established the almost absolute nature of the privilege. In **Duke of Argyll v Duchess of Argyll** 1962 SC (HL) 88, Lord Reid noted that the effect and purpose of the law of confidentiality "is to prevent the Court from ascertaining the truth so far as regards those matters which the law holds to be confidential".

[177] LPP is also viewed as "a fundamental human right long established in the common law" and as being "much more than an ordinary rule of evidence, limited in its application to the facts of a particular case", but rather as "a fundamental condition on which the administration of justice as a whole rests". See **Regina v Special Commissioner and another, Ex p Morgan Grenfell & Co Ltd** [2002] UKHL 21, per Lord Hoffman, and **R v Derby Magistrates' Court, ex parte B and another appeal** [1995] 4 All ER 526, per Lord Taylor of Gosforth CJ.

[178] Lord Millett in **Prince Jefri Bolkiah v KPMG (a firm)** [1999] 1 All ER 517, described the duty of confidentiality, to which LPP attaches, as "unqualified". According to him:

> "It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate the information to a third party. It is a duty not to misuse it, that is to say, without the consent of the former client to make any use of it or to

> cause any use to be made of it by others otherwise than for his benefit."

[179] Lord Millett further made the point that while the client cannot be protected from accidental or inadvertent disclosure, he is entitled to prevent his attorney-at-law from exposing him to any avoidable risk.

[180] It has also been established that it is not part of the court's role to weigh the claim of privilege in any particular case against another public interest. In **R v Derby Magistrates' Court, ex parte B**, Lord Taylor of Gosforth CJ observed at pages 540 and 541:

> "As for the analogy with public interest immunity, I accept that the various classes of case in which relevant evidence is excluded may, as Lord Simon of Glaisdale suggested, be regarded as forming part of a continuous spectrum. But it by no means follows that because a balancing exercise is called for in one class of case, it may also be allowed in another. Legal professional privilege and public interest immunity are as different in their origin as they are in their scope. Putting it another way, if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the sixteenth century, and since then has applied across the board in every case, irrespective of the client's individual merits."

[181] Authorities such as **Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)** [2004] UKHL 48, **Ventouris v Mountain** [1991] 1 WLR 607 and **Balabel v Air India** [1988] Ch 317, are also very instructive. These cases affirm that, for sound reasons of public policy, the overarching principle is that confidential communications between a client and his attorney-at-law,

for the purpose of obtaining legal advice, are generally privileged from discovery or disclosure.

[182] Accordingly, an attorney-at-law who has in his possession confidential documentation or information is under an absolute duty to keep it confidential. This principle was clearly enunciated by Bingham LJ in **Ventouris v Mountain**, where at page 611, he stated:

> "The doctrine of legal professional privilege is rooted in the public interest, which requires that hopeless and exaggerated claims and unsound and spurious defences be so far as possible discouraged, and civil disputes so far as possible settled without resort to judicial decision. To this end it is necessary that actual and potential litigants, be they claimants or respondents, should be free to unburden themselves without reserve to their legal advisers, and their legal advisers be free to give honest and candid advice on a sound factual basis, without fear that these communications may be relied on by an opposing party if the dispute comes before the court for decision. It is the protection of confidential communications between client and legal adviser which lies at the heart of legal professional privilege, as is clear from the classical exposition of the law by Sir George Jessel MR in *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, 648–649. Without the consent of the client, and in the absence of iniquity or dispute between client and solicitor, no inquiry may be made into or disclosure made of any instructions which the client gave the solicitor or any advice the solicitor gave the client, whether in writing or orally."

[183] There is no question that LPP is critical to the administration of justice, the legal system, in general, and the preservation of the rule of law in every free and democratic society. It is at the core of the fundamental rights to privacy, due process, and fair hearing. As Lord Rodger of Earlsferry opined in **Three Rivers District Council and**

others v Governor and Company of the Bank of England (No 6) at paragraph 54:

> "...[T]he public interest justification for the privilege is the same today as it was 350 years ago: it does not change, or need to change, because it is rooted in an aspect of human nature which does not change either. If the advice given by lawyers is to be sound, their clients must make them aware of all the relevant circumstances of the problem. Clients will be reluctant to do so, however, unless they can be sure that what they say about any potentially damaging or embarrassing circumstances will not be revealed later. So it is settled that, in the absence of a waiver by the client, communications between clients and their lawyers for the purpose of obtaining legal advice must be kept confidential and cannot be made the subject of evidence. Of course, this means that, from time to time, a tribunal will be deprived of potentially useful evidence but the public interest in people being properly advised on matters of law is held to outweigh the competing public interest in making that evidence available."

[184] The Full Court gave clear recognition to the importance of LPP in a free and democratic society. Having had regard to various authorities between paragraphs [57] to [99] of its judgment, it accepted that LPP is a fundamental right that is enjoyed by all citizens and that, although it is not expressly stated in the Charter, it is implicitly enshrined in the provisions which guarantee the right to legal representation and the right to privacy.

Analysis and findings

[185] The appellant's argument, in the main, is that confidentiality is the cornerstone of LPP and is protected by the Constitution. However, it has been undermined by the Regime. The respondents, however, have denied the appellant's claim that LLP is

threatened or eroded by the Regime; they maintained, for several reasons pointed out to the court, that LPP is protected and preserved under the Regime.

[186] The appellant's preoccupation with the implication of the Regime for LPP is understandable, given the indisputable intrusion of the Regime on attorney-at-law/client communication and confidentiality in their business dealings and relationships. LPP has long been generally held as inviolable and sacrosanct in a free and democratic society. Parliament has shown the recognition on its part of the need to protect and preserve it during the monitoring functions of the competent authority (see section 91A(3) of the POCA). The GLC has also sought to give expression to the legislative will that LPP should not be undermined or destroyed by the Regime. Hence, the specific reference in the GLC Guidance to LPP and the need for regulated attorneys-at-law to act in a manner to preserve it, during the course of complying with the Regime. There is, therefore, clear evidence that LPP is not ousted or overridden by the legislative scheme.

[187] The ultimate question to be resolved in the constitutional challenge grounded on the alleged threat to LPP, is whether, Parliament, in extending the AML/CFT measures to attorneys-at-law as part of the regulated sector, has taken the necessary steps to ensure its protection and continued preservation as a fundamental right in our democracy. The appellant's contention is that Parliament has failed to do so and that the Full Court got it wrong in concluding to the contrary.

[188] In its quest to determine whether the Regime has undermined LPP or rendered it vulnerable, as contended by the appellant, the Full Court conducted its analysis by a

consideration of the Charter rights that the appellant alleged were engaged and breached by the Regime, through the erosion or undermining of LPP. This cannot be said to be a wrong approach, given that what was before the court for resolution was a question of whether the Constitution had been breached, is being breached, or is likely to be breached by the Regime.

[189] This was recognised by the Full Court at paragraphs [102] and [103] of the judgment, where it stated:

> "[102] In order for the [appellant] to succeed on this aspect of the claim there must at the very least be shown some infringement of the privacy rights enshrined in section 13 (3) (j) and the right to legal representation enshrined in section 16 (6)(c) of the constitution. ...
>
> [103] In order to show infringement of section 13(3)(j)(ii) and (iii) of the Charter, the [appellant] has to show that the Regime has undermined the right to LPP and or confidentiality. ..."

The connection between LPP and the constitutional rights to privacy was explicitly recognised by the Full Court.

(d) LPP and the constitutional right to privacy

[190] In assessing whether LPP is adversely affected by the Regime, and the implication, if any, for the constitutionally guaranteed right to privacy of regulated attorneys-at-law and their clients, the Full Court at paragraph [103] of the judgment outlined a three-step approach it would take in treating with the question. The starting point was to establish whether LPP applies to the activities engaged under the Regime. If LPP was found to apply, the next step was to assess the provisions of the Regime to

evaluate the claim of breach. If a breach of or interference with the right was established, then the final step would be to consider whether the breach or interference is demonstrably justified in a free and democratic society.

[191] In determining whether LPP applies to the activities specified in the DFNI Order, the Full Court stated at paragraphs [131] and [132] of the judgment:

> "[131] In relation to the activities in the Order, a useful and rudimentary test is the one suggested in **Three Rivers No 6**, which asked whether a lawyer would need to wear his 'legal spectacles' to advise on the matter in question. If the answer is no, then there would be no 'relevant legal context' and privilege would not apply. **The concept of LPP has been and remains closely tied to the administration of justice and the duty of an attorney to the court. There will be no privilege if a communication is between a lawyer and client for purely business and or financially related transactions**.
>
> [132] It follows from the foregoing that it is the acknowledged established limits to LPP which will assist the court to identify the extent of any interference with LPP and the privacy rights enshrined in sec 13 (3) (j) (i) and (ii) of the Charter. It is this court's view that the activities listed in the Order are not generally transactions within a relevant legal context as described in **Balabel v Air India**, and therefore are not accorded the protection of LPP. In the few instances where a relevant legal context exists, the exemption from privilege in relation to communications with the intention of furthering a criminal purpose will almost invariably apply to the disclosure of suspicious transactions imposed by the Regime. Consequently, although the spectre of LPP looms large from the perspective of the claimant, analysis reveals that it plays an insignificant role. This is so as it will only be in rare circumstances that LPP attaches to communications in relation to transactions concerning activities captured within the Order." (Emphasis added)

[192] The Full Court acknowledged that LPP applies to some of the activities specified in the DNFI Order, albeit to a very limited extent. It then made the following conclusions:

i. The activities in the DNFI Order are not generally transactions within a relevant legal context and are, therefore, not accorded the protection of LPP. In the rare instances that a relevant legal context exists, the exemption from privilege in relation to communications with the intention of furthering a criminal purpose will, almost invariably, apply to the disclosure of suspicious transactions imposed by the Regime.

ii. Regulated attorneys-at-law are able to assert privilege, prior to any examination by the GLC, thus providing a safeguard.

iii. Any potential breach of LPP is minimised by the fact that examinations will be conducted by the GLC, which is the regulatory body for attorneys-at-law.

iv. LPP is explicitly protected and preserved by the Regime and not undermined or placed at risk by it.

[193] On my review of the Full Court's reasoning, against the background of the applicable law, including the provisions of the Regime, I cannot say that the complaint of the appellant concerning its approach and conclusion, relating to LPP, is without

merit. The conclusion that LPP is protected by the Regime, rather than adversely affected by it, to my mind, seems to have emanated from a restrictive view of what LPP entails as well as an apparent misapprehension of the nature and scope of the activities specified in the DNFI Order.

[194] In **Balabel v Air India**, Taylor LJ made the point that although legal advice privilege was originally confined to advice regarding litigation, it was extended to non-litigious business. Despite that extension, however, the purpose and scope of the privilege, he said, is still to enable legal advice to be sought and given in confidence. The learned judge stated the applicable test to be, "whether the communication or other document was made confidentially for the purpose of legal advice". Those purposes, he said, must be construed broadly. As he put it, legal advice is not confined to telling the client the law, "it must include advice as to what should prudently and sensibly be done in the relevant legal context". A relevant legal context, he opined, does not exist where there are dealings with a solicitor as a "business adviser or man of affairs".

[195] It is with these dicta in mind that, in assessing the activities targeted by the Regime, the Full Court concluded that they are "not generally transactions within a relevant legal context as described in **Balabel v Air India**, [and so], are not accorded the protection of LPP". It went further to state that in circumstances where a relevant legal context exists, the exemption from privilege will almost, invariably, apply. This is how it put its observations in paragraphs [119] and [120] of the judgment:

> "[119] **There are very few exceptions to the position that the DNFI activities listed in the Order are outside of a relevant legal context. These relate to activities, enumerated as part of item (v) in the Order that is, that of creating, operating or managing a legal person or legal arrangement (such as a trust or settlement). The creating operating or managing a legal arrangement such as a trust or settlement might in fact require non-contentious legal proceedings to formalise them. Another example is illustrated by the GLC in its Guidance (See paragraph 15)** ***'for example non-contentious legal proceedings for the administering of estates of deceased persons would come within the activities designated in the Order as such proceedings have as its purpose the creation of arrangements in respect of property or other assets which will not be the subject of thorough judicial examination to ensure that there is no illicitly obtained property that is being dealt with by such arrangements.'***
>
> [120] **These activities are likely to include legal advice as to rights and liabilities as well as litigation advice**. In following the principles of **Balabel v Air India** and **Three Rivers No 6** and the tests set therein, the cloak of privilege would attach to these transactions." (Emphasis added)

[196] It does seem, as the appellant has noted, that the Full Court believed that a relevant legal context must involve the likelihood or possibility of the activities giving rise to legal proceedings. Therefore, as a result of that belief, it only found the activities in item (v) of the DNFI Order, which it said may involve legal proceedings, contentious or not, the ones that will arise in a relevant legal context. It formed the view that those activities are likely to take place within a relevant legal context because they are likely to include legal advice as to rights and liabilities as well as litigation advice. The Full Court, by so doing, would have viewed what is meant by relevant legal context within

narrow confines, that is, the communication must concern a matter that could, ultimately, form the basis of litigation.

[197] Another related aspect of the Full Court's reasoning, which seems to be flawed, is the categorical and, seemingly, unqualified assertion that, "[t]here will be no privilege if a communication is between a lawyer and client for purely business and or financially related transactions". This is very much in keeping with the restrictive approach to legal advice privilege that was taken by the Court of Appeal in **Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)** and which became the subject of appeal to the House of Lords. The Court of Appeal was of the view that there was no justification for the rule if the communication between the attorney-at-law and his client concerned a matter that could not form the basis of litigation. The House of Lords, however, rejected that "narrow policy justification".

[198] Lord Scott of Foscote, speaking in the House of Lords, at paragraphs [30] to [33] of the judgment reviewed the authorities on the justification for LPP in a non-litigious context and summed up the "wider policy justification" for privilege at paragraph [34] in this way:

> "**None of these judicial dicta tie the justification for legal advice privilege to the conduct of litigation. They recognise that in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognise that the**

> **seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; they recognise that in order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and they recognise that unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without their (the clients') consent, there will be cases in which the requisite candour will be absent. It is obviously true that in very many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non-disclosure that the present law of privilege provides. But the dicta to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else** (see also paras 15.8 to 15.10 of *Zuckerman's Civil Procedure* (2003) where the author refers to the rationale underlying legal advice privilege as 'the rule of law rationale'). I, for my part, subscribe to this idea. It justifies, in my opinion, the retention of legal advice privilege in our law, notwithstanding that as a result cases may sometimes have to be decided in ignorance of relevant probative material." (Emphasis added)

[199] Similarly, Taylor LJ's dicta in **Balabel v Air India** also make it absolutely clear that whilst litigation privilege is a widely accepted notion in English jurisprudence, LPP is also recognised as a fundamental right in a non-litigious context. In illuminating this principle, Taylor LJ stated, in part, at page 330:

> "**Although originally confined to advice regarding litigation, the privilege was extended to non-litigious business. Nevertheless, despite that extension, the purpose and scope of the privilege is still to enable legal advice to be sought and given in confidence. In my judgment, therefore, the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly**. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as 'please advise me what I should do.' But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice." (Emphasis added)

[200] This reasoning confirms the position that the purpose of legal advice must be construed broadly, since "in most lawyer/client relationship, especially where a transaction involves protracted dealings, advice may be required of or [may be] appropriate on matters great or small at various stages".

[201] I would also highlight, for present purposes, Taylor LJ's dictum at pages 331 to 332 of **Balabel v Air India**, which shows that communication within the context of a

conveyancing transaction could attract LPP. This is what the learned judge stated in this regard:

> "It follows from this analysis that those dicta in the decided cases which appear to extend privilege without limit to all solicitor and client communication on matters within the ordinary business of a solicitor and referable to that relationship are too wide. It may be that the broad terms used in the earlier cases reflect the restricted range of solicitors' activities at the time. Their role then would have been confined for the most part to that of lawyer and would not have extended to business adviser or man of affairs. To speak therefore of matters 'within the ordinary business of a solicitor' would in practice usually have meant the giving of advice and assistance of a specifically legal nature. But the range of assistance given by solicitors to their clients and of activities carried out on their behalf has greatly broadened in recent times and is still developing. Hence the need to re-examine the scope of legal professional privilege and keep it within justifiable bounds.
>
> **By contrast, the formulation adopted by Judge Baker and quoted earlier in this judgment is in my view too restrictive. It suggests that a communication only enjoys privilege if it specifically seeks or conveys advice. If it does so, it is privileged, notwithstanding it may also contain 'narratives of fact or other statements which in themselves would not be protected'. However, the second half of the judge's formulation implies that all documents recording information or transactions with or without instructions or recording meetings lack privilege if they do not specifically contain or seek advice. The passage cited above from the judgment of Scott J in *Galadari's case*, 6 October 1986, is to the same effect. In my judgment that formulation is too narrow. As indicated, whether such documents are privileged or not must depend on whether they are part of that necessary exchange of information of which the object is the giving of legal advice as and when appropriate. Accordingly, I agree with the formulation made by Master Munrow in the present**

case, subject to the additional words which I have placed in brackets. He said:

> **'Once solicitors are embarked on a conveyancing transaction they are employed to ensure that the client steers clear of legal difficulties, and communications passing in the handling of that transaction are privileged (if their aim is the obtaining of appropriate legal advice)** since the whole handling is experience and legal skill in action and a document uttered during the transaction does not have to incorporate a specific piece of legal advice to obtain that privilege.'" (Emphasis added)

[202] The dicta from the authorities cited above show that LPP does not arise only where legal advice is actually given but where the aim or purpose of the communication is for obtaining such legal advice. The dicta also show that LPP can arise in transactions relating to the sale and purchase of land, which was not recognised by the Full Court as transactions that could arise within those activities specified in the DFNI Order. So, quite apart from those activities identified by the Full Court as potentially attracting LPP, which are enumerated under item (v) of the DFNI Order, there are others, such as the selling or purchasing of real estate (item (i)) and the selling and purchasing a business entity (item (vi)). That would represent one-half of the activities targeted by the Regime.

[203] The Full Court's view of what is a relevant legal context, or when a relevant legal context may arise, does not fully accord with the reasoning in **Balabel v Air India** of Taylor LJ, who placed it outside of a non-litigious, contentious or non-contentious context, thereby embracing conveyancing transactions.

[204] Furthermore, the GLC Guidance in paragraph 14 states that the terms of the DFNI Order would be construed broadly to include all services provided by regulated attorneys-at-law, from the point that contact is first made with the client. It follows, therefore, that during the course of any transaction relating to the specified activities, even at the point of first contact, a client could well pass information to the regulated attorney-at-law for the purpose of obtaining legal advice, which could involve questions as to his obligations, rights and liabilities in private or public law. So, legal advice privilege could well apply from the first contact made by the client with the regulated attorney-at-law with a view to conducting a transaction within one of the activities listed in the DNFI Order.

[205] It is worthy of note that the determination of what communication is within a relevant legal context, and therefore attracts legal advice privilege, is not, at all times, an easy one. As far back as 1881, Bacon V-C in **Wheeler v Le Marchant** (1881) 17 Ch D 675 at 677, recognised that in considering legal advice privilege, "the subject is always a difficult one".

[206] This observation was affirmed recently by the English Court of Appeal in **R (on the application Jet2.com Ltd) v Civil Aviation Authority (Law Society of England and Wales intervening)** [2020] EWCA Civ 35, which was described as involving an appeal that "raise[d] important issues concerning legal advice privilege". Having referred to the dictum of Bacon V-C, the court noted, that since 1881, when **Wheeler v La Merchant** was decided (being almost 140 years ago), "the subject has

not become any more straightforward". The court opined that given the more complex arrangements that now exists for commercial transactions and the obtaining of legal advice, including new modes of communication between those involved in such activities, the difficulties have been compounded.

[207] Indeed, case law has demonstrated that the determination of whether legal advice privilege applies to a given set of circumstances often requires close and careful scrutiny of the content of the communication involved against the background of all the surrounding circumstances. A good example of the difficulty involved in determining whether LPP attaches to a particular communication between an attorney-at-law and his client is provided by an illustration used by Lord Scott of Foscote in **Three Rivers District Council and others v Governor and Company of the Bank of England (No 5)** [2005] 4 ALL ER 948, at paragraph 42. There, His Lordship, before making the point that there may be marginal cases where the answer is not easy, stated:

> "42. Mr Pollock referred to advice sought from and given by a lawyer as to how to set about joining a private club. He put this forward as an obvious example of a case where legal advice privilege would not be attracted. The reason, Mr Pollock suggested, was that the advice being sought would not relate to the client's legal rights or obligations. I agree that legal advice privilege would not be attracted, not because the advice would necessarily not relate to the client's legal rights or obligations but because the bare bones of Mr Pollock's example had no legal context whatever. If his example were embellished with detail the answer might be different. Suppose the applicant for membership of the club had previously made an unsuccessful application to join the club, believed that his rejection had been inconsistent with the club's admission rules and wanted to make a fresh application with a view to

> testing the legality of his rejection if he were again to be blackballed. I think Mr Pollock would accept that in those circumstances the communications between the lawyer and the applicant would be protected by legal advice privilege. It would be protected because the communication would have a relevant legal context. It would relate to the legal remedies that might be available if the applicant's application were again unsuccessful."

[208] This example was given by Lord Scott of Foscote to demonstrate the difficulty attendant on determining the question of whether LPP arises in relation to a particular communication between an attorney-at-law and his client. Again, in **Three Rivers (No 5)** at paragraph [38], His Lordship opined that there is no way of avoiding difficulty in deciding in marginal cases whether the seeking of legal advice from, or the giving of advice by, an attorney-at-law, does or does not take place in a relevant legal context so as to attract LPP. He proceeded to point out that:

> "38. ...In cases of doubt the judge called upon to make the decision should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law. If it does not, then, in my opinion, legal advice privilege would not apply. If it does so relate then, in my opinion, the judge should ask himself whether the communication falls within the policy underlying the justification for legal advice privilege in our law. Is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect the privilege to apply? The criterion must, in my opinion, be an objective one."

[209] The fact that communication may arise in matters that have no connection to litigation and may emanate within the context of, or relate to, a business and financial transaction, does not therefore preclude LPP from operating in the form of legal advice privilege. It is not simply the nature of or the label ascribed to the transaction that will

determine whether LPP arises but rather the content and substance of the communication between the regulated attorney-at-law and his client within the context of or relating to that particular transaction.

[210] In **R (on the application of Jet2.com Ltd) v Civil Aviation Authority**, the court, having reviewed several relevant authorities, summarised the position relating to legal advice privilege as follows:

> "(i) **Consideration of [legal advice privilege] has to be undertaken on the basis of particular documents, and not simply the brief or role of the relevant lawyer.**
>
> (ii) However, where that brief or role is qua lawyer, because 'legal advice' includes advice on the application of the law and the consideration of particular circumstances from a legal point of view, and a broad approach is also taken to 'continuum of communications', most communications to and from the client are likely to be set in a legal context and are likely to be privileged. Nevertheless, a particular communication may not be so - it may step outside the usual brief or role.
>
> (iii) **Similarly, where the usual brief or role is not qua lawyer but (eg) as a commercial person, a particular document may still fall within the scope of [legal advice privilege] if it is specifically in a legal context and therefore, again, falls outside the usual brief or role**.
>
> (iv) In considering whether a document is covered by [legal advice privilege], the breadth of the concepts of legal advice and continuum of communications must be taken into account.
>
> (v) **Although of course the context will be important, the court is unlikely to be persuaded by fine arguments as to whether a particular document or communication does fall outside legal advice, particularly as the legal and non-legal might be so**

> **intermingled that distinguishing the two and severance are for practical purposes impossible and it can be properly said that the dominant purpose of the document as a whole is giving or seeking legal advice**.
>
> (vi) Where there is no such intermingling, and the legal and non-legal can be identified, then the document or communication can be severed: the parts covered by [legal advice privilege] will be non-disclosable (and redactable), and the rest will be disclosable (see, eg, *Curlex Manufacturing Pty Ltd v Carlingford Australia General Insurance Ltd* [1987] 2 Qd R 335 and *GE Capital Corporate Finance Group Ltd v Bankers Trust Co* [1995] 1 WLR 172).
>
> (vii) **A communication to a lawyer may be covered by the privilege even if express legal advice is not sought: it is open to a client to keep his lawyer acquainted with the circumstances of a matter on the basis that the lawyer will provide legal advice as and when he considers it appropriate**." (Emphasis added)

[211] In the light of the principles deduced from the various authorities reviewed above, there is sufficient basis for one to conclude that it would be an oversimplification of the possible issues that may arise in relation to LPP to look at a specified activity, on the face of it, and without any information, communication or context, form the view that LPP can never arise within the context of communication relating to that activity. A relevant legal context cannot be determined in abstract; it must be grounded in reality.

[212] It is in the light of the same authorities examined above that I find it difficult to discern the accuracy in the Full Court's finding that it would "...only be in rare circumstances that LPP attaches to communications in relation to transactions concerning activities captured within the [DNFI] Order" and that, almost invariably, where a relevant legal context may be found to exist, the exemption of privilege will

apply. These conclusions are difficult to accept. The Full Court did not have the opportunity to examine, in substance and content, any or all possible communications that could take place between a regulated attorney-at-law and his client within the context of, or relating to the specified activities. The Full Court would have made a conclusion without any knowledge of pertinent facts that would be necessary for it to determine whether or not a relevant legal context exists at the time the communication would have been made. Therefore, it is a finding that lacks a viable evidential base to support it.

[213] I am propelled to accept the criticism levelled by the appellant at the approach of the Full Court that it had engaged in an analysis, which seems more fitting to a dispute in court in which the question to be resolved is one of whether LPP attaches to a particular communication or a given set of circumstances which have been disclosed to the court for its scrutiny.

[214] Also, if one were to adopt the approach of the Full Court, in starting with the activities listed in the DNFI Order, the question of whether LPP is sufficiently and effectively protected could not properly be resolved by a consideration of the number of activities specified in the Order that could engage LPP. But, even if that approach is adopted, it would show that at least one-half of the enumerated activities could give rise to LPP. This, therefore, affects the Full Court's conclusion that LPP would rarely arise because only the activities at item (v) of the DNFI Order would have given rise to it. Therefore, the critical question is whether any of the specified activities could engage

LPP. Once it is concluded that LPP could arise within the context of even one of those activities, as the Full Court opined, then the question must then be: is LPP adequately and effectively protected?

[215] What was critical to a proper assessment of the effect of the Regime on LPP was for there to have been an examination of the four corners of the Regime to determine, whether, indeed, LPP is sufficiently protected by it. However, it is not so much the approach of the Full Court that renders the decision questionable but rather its reasoning and the conclusion it arrived at, having taken that approach. That conclusion is that the specified activities will generally not take place in a relevant legal context, but only rarely, and that as a result, LPP plays only an insignificant role. This conclusion is not accepted for reasons that will now be outlined.

[216] Despite the comprehensive analysis undertaken by the Full Court, and the many complaints against its reasoning by the appellant, the simple question for this court is whether LPP has been sufficiently safeguarded or protected by the Regime as found by the Full Court. A consideration of this question is crucial because it would serve to inform the resolution of the question of not so much whether the privacy rights of regulated attorneys-at-law and their clients are engaged by the Regime (this is obvious and is the finding of the Full Court), but rather the extent of the intrusion on, or limitation of, the rights to privacy by the Regime. It is to the impugned provisions of the Regime that attention will now be directed.

(e) LPP and the examination powers of the GLC

[217] On a close review of the matters which form the focus of the GLC's monitoring functions, as set out in paragraph 49 of the GLC Guidance, it is apparent, that the role intended to be undertaken by the Regime, would be primarily regulatory, as Mr Wood submitted. This regulatory role is, particularly, evident when one focuses attention on the GLC's Anti-Money Laundering Examination Form, provided for in Appendix B of the GLC Guidance concerning routine examinations. This role, at first glance, seems innocuous.

[218] It is clear, though, that apart from routine examinations, the GLC is also empowered to conduct other examinations, such as special and random examinations. Special examinations are undertaken in circumstances where the GLC has cause to be concerned about the compliance of a regulated attorney-at-law with the Regime or where it has reason to believe that an attorney-at-law is providing designated activities but has declared otherwise in the requisite annual declaration. In terms of random examinations, there is nothing disclosed as to exactly what these will entail. The processes and protocols for these examinations are not disclosed, except that prior notice will be given of the intention to inspect. No form, which will be used in those examinations, has been made available for scrutiny of the court. Therefore, what is likely to transpire during such examinations remains unknown. There is no certainty that claims of LPP could not arise in such situations.

[219] The plain fact is that if there is no possibility of privileged documents being passed on to the GLC during the examinations to be conducted by it, then there would

have been no need for a strong directive from it, in its Guidance, that documents are to be segregated from those that are not before the examinations are conducted. Also, there would have been no need for the POCA, itself, to provide that privileged information is exempt from disclosure during the execution of the functions of the competent authority. This is an undeniable recognition of the possibility of the disclosure of privileged documents connected to the enforcement of the Regime through the monitoring functions of the GLC.

[220] Once a possibility exists that privileged documents could be disclosed, wittingly, unwittingly, inadvertently or otherwise, then there should be adequate mechanisms in place to guard against such disclosure in protecting the client to whom it belongs, given the value of LPP to a free and democratic society.

[221] The relevant provisions of the POCA, while making it clear that documents or information subject to LPP must not be disclosed, do not expressly state that an attorney-at-law may claim privilege on behalf of his client. It is, however, implied. It is expected that any competent and well-thinking attorney-at-law would seek to claim privilege on behalf of his client, once he believes such a claim should be made. The POCA, however, prescribes no procedure governing the issue, if a claim of privilege is to be made during the course of the monitoring functions of the GLC.

[222] Even though the GLC is contending that the court's involvement could be sought where there is a dispute, there is nothing provided in the legislation, the Regulations, or by any rule of procedure, for the resolution of the issue of disclosure by judicial

intervention in such circumstances. A note is made of section 136 of the POCA; it provides that rules of court may make such provision as is necessary or expedient to give effect to the Regulations, including provision relating to the exercise of functions of a judge conferred or imposed by the Regulations. However, to date, there are no such rules. The disclosure provisions in Part VI of the POCA and Part 28 of the Civil Procedure Rules, 2002 would not apply to the matters relative to the GLC's functions under the impugned provisions.

[223] The absence of a specified mechanism in the POCA and the Regulations, aimed at governing disputes that may arise, relative to disclosure and LPP within the context of the GLC's monitoring function, is, indeed, a significant lacuna in the legislative scheme, itself. To my mind, merely providing, without more, that documents or information subject to LPP should not be disclosed, without expressly providing an effective mechanism to ensure its protection, is not going far enough.

[224] Admittedly, the GLC Guidance has sought to provide an avenue through which a regulated attorney-at-law may seek to protect privileged communication on his client's behalf. This avenue is the prescription that documents be sorted and segregated. Hence, the GLC Guidance speaks clearly as to what is to be made available for examination; privileged information is not one of them. In this way, privileged information may be protected. However, apart from indicating to regulated attorneys-at-law that they should take care to separate privileged from unprivileged information or documents, there is nothing provided to ensure that the client's interest is effectively

safeguarded. The GLC Guidance is only directed at the regulated attorneys-at-law's treatment of the information. This facility that is provided by the GLC is also not enough for the Regime to pass the scrutiny of the court.

[225] The cases of **Her Majesty The Queen v Lavallee, Rackel & Heintz and Others** ("**Lavallee**") [2002] 3 SCR 209 and **Attorney General of Canada v Federation of Law Societies of Canada and Others** ("**Canada v FLSC**") [2015] 1 SCR 401, both heavily relied on by the appellant, are quite instructive. They offer a good insight into the form and level of protection that should be afforded to LPP by the Regime. When one looks at those cases, a clear picture emerges as to how much further the legislature in Jamaica could have gone, and ought to have gone, to better protect LPP, as a fundamental human right. It would prove useful to provide a fair understanding of those cases, in so far as is relevant within the current context.

[226] In **Lavallee**, materials were seized from law offices by police under search warrants. Three separate appeals were brought before the court. They dealt with the single issue, that was, whether section 488.1 of the Canadian Criminal Code, which sets out the procedure for determining a claim of solicitor-client privilege concerning document seized from a law office under a warrant, infringed section 8 of the Canadian Charter and, if so, whether the infringement was justified under section 1. The procedure mandated that the material be sealed at the time of the search; the solicitor makes an application within strict time lines for a determination that the material is, indeed, protected by privilege; and that with the permission of the Court, the

Government may be permitted to examine the material to assist in a determination on the issue of the existence of privilege.

[227] In concluding that solicitor-client privilege was not adequately protected by the procedure, the majority opined as follows:

> i. Section 8 of the Charter only protects against unreasonable searches and seizures, and the issue is whether the procedure set out by section 488.1 results in a reasonable search and seizure of potentially privileged documents in possession of a lawyer. Section 488.1 permits solicitor-client privilege to "fall through the interstices of its inadequate procedure". This possible automatic loss of solicitor-client privilege, through the normal operation of the law, is not reasonable.
>
> ii. Solicitor-client privilege is a principle of fundamental justice and a civil right of supreme importance in Canadian law. Where the interest at stake is solicitor-client privilege, the usual exercise of balancing privacy interests and the exigencies of law enforcement is not, particularly, helpful because privilege is a positive feature of law enforcement not an impediment to it.
>
> iii. Solicitor-client privilege must remain as close to absolute as possible to retain its relevance, and so, the court must adopt stringent norms to ensure its protection.

iv. The procedure set out in the section impugned, must minimally impair solicitor-client privilege to pass the Canadian Charter scrutiny.

v. The impugned section more than minimally impairs solicitor-client privilege and amounts to an unreasonable search and seizure, contrary to section 8 of the Canadian Charter.

vi. The constitutional failings can result from: (a) the absence or inaction of the solicitor; (b) the naming of the client; (c) the fact that notice is not given to the client; (d) its strict time limits; (e) an absence of discretion on the part of the judge determining the existence of solicitor-client privilege; and (f) the possibility of the Attorney-General gaining access to privileged information before judicial determination.

vii. The one fatal principle shared by the above constitutional failings is the potential breach of solicitor-client privilege without the client's knowledge, let alone consent. Privilege does not come into being by an assertion of a privilege claim; it exists independently.

viii. The fact that competent counsel will attempt to ascertain the whereabouts of their clients and will likely assert blanket privilege at the outset does not preclude the state's duty to

ensure sufficient protection of the rights of the privilege holder. Section 488.1 provides that reasonable opportunity to ensure that the privileged information remains so, must be given to the privilege keeper, but not, to the privilege holder. It cannot be assumed that the lawyer is the alter-ego of the client.

ix. Section 488.1(8), which provides that no examination may be carried out without affording a reasonable opportunity for a claim of solicitor-client privilege to be made, cannot raise this entire procedural scheme to a standard of constitutional reasonableness due to the failure to address directly the client's entitlement to ensure the adequate protection of his or her rights.

[228] In **Canada v FLSC**, the court affirmed the dicta in **Lavallee**. The headnote of the former substantially reflects the pertinent facts. It is being reproduced below, almost verbatim, but with a few necessary modifications for our purposes. These facts, in summary, are as follows.

[229] 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 ("the Canadian Act"), and the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations, SOR/2002-184 ("the Canadian Regulations"), (collectively referred to as "the Canadian Regime"), imposed duties on

financial intermediaries, including advocates and notaries in Quebec and barristers and solicitors in all other provinces. The legislation required financial intermediaries to collect, record and retain material, including information verifying the identity of those on whose behalf they pay or receive money. It put in place an agency to oversee compliance, the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") and allowed that agency to "examine the records and enquire into the business and any affairs", of the persons specified in the statute for the purpose of ensuring compliance with Part 1 of the Canadian Act. It imposed fines and penal consequences for non-compliance.

[230] Sections 5(i) and (j) of the Canadian Act made professions specified in the Canadian Regulations subject to the record-keeping and verification requirements. Section 33.3 of the Canadian Regulations made legal counsel subject to the Canadian 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 Canadian Regulations imposed recording keeping requirements. Section 59.4 of the Canadian Regulations imposed identification requirements. Section 11.1 of the Canadian Regulations set out the information that must be collected and retained in the course of verifying identity. Sections 62, 63 and 63.1 of the Canadian Act provided for FINTRAC to examine and take information in the possession of lawyers.

[231] It allowed an authorised person to examine the records and enquire into the business affairs of lawyers and law firms, among others. An authorised person was defined as any person authorised by the director of FINTRAC to act under sections 62 to 64 of the Canadian Act. For that purpose, the authorised person was permitted to enter any premises (other than a dwelling house) without a warrant, use any computer or data processing system in the premises to examine any data therein and reproduce any record. The owner or the person in charge of the premises entered, and every person found therein, was obliged to give the authorised person all reasonable assistance to enable him to carry out his responsibilities.

[232] Section 64 of the Canadian Act provided that a reasonable opportunity must be given for the making of a claim of LPP before any documents were examined or copied by an authorised person during a section 62 examination. The lawyer claiming privilege was required to seal, identify and retain documents and to make an application before a judge, within 14 days, for an order that privileged documents be released to him. If the lawyer did not make such an application, the Attorney General of Canada could apply for an order making the documents available for examination.

[233] If privilege was claimed, section 64 (10) required that the lawyer discloses the client's last known address to FINTRAC so that the authorised person may endeavour to advise the client of the claim of privilege that had been made on his behalf. By doing so, the client would be given an opportunity, if it was practicable within the time limited by the section, to waive the privilege before a judge decided the matter.

[234] Section 64 provided limitations on the inspection powers concerning material for which LPP was being claimed.

[235] Section 65 stipulated the circumstances in which FINTRAC was permitted to disclose to the appropriate law enforcement agencies any information of which it became aware during an examination conducted under sections 62 to 63.1 and that it suspects on reasonable grounds, is evidence of a contravention of Part 1 of the Canadian Act.

[236] The Canadian Federation of Law Societies ("FLSC") commenced a constitutional challenge to the legislation as it applied to the legal profession. It was joined in its action by other bodies representing lawyers and notaries. Part of the challenge was that the recording and related obligations imposed on lawyers by Part 1 of the Canadian Act violated section 7 of the Canadian Charter by jeopardising the liberty rights of lawyers and their clients in a manner that was inconsistent with the principles of fundamental justice, which were:

i. Solicitor-client confidentiality and privilege;

ii. Lawyers' duty of loyalty to their clients; and

iii. The independence of the Bar.

[237] The FLSC and others also claimed that sections 62 to 64 of the Canadian Act violated section 8 of the Canadian Charter by authorizing state agents to conduct warrantless searches of lawyers' offices.

[238] The first instance judge of the Supreme Court of British Columbia (the application judge) held that the challenged provisions violated section 7 of the Canadian Charter and the infringement was not saved under section 1. She did not address whether the provisions infringed section 8 of the Canadian Charter because she did not consider it necessary to do so. She, however, read down sections 5(i), 5(j), 62, 63 and 63.1 of the Canadian Act and section 11.1 of the Canadian Regulations to exclude legal counsel and legal firms. She struck down section 64 of the Canadian Act and sections 33.3, 33.4, 33.5, and 59.4 of the Canadian Regulations. The British Columbia Court of Appeal dismissed an appeal brought by the Attorney General of Canada, although it found that LPP was not affected by the Regime. It concluded that the Regime was unconstitutional for violating the independence of the Bar.

[239] On the Attorney General's appeal to the Supreme Court of Canada, the appeal was allowed, in part. Although the decision, as will be seen, is quite instructive for many reasons relevant to the instant case, at this juncture, however, focus will be directed only at its treatment of the provisions in the Canadian Regime for the protection of LPP.

[240] Despite the provisions in the Canadian Act to address issues that might have arisen concerning LPP during the enforcement of that Regime, they were still found by the Supreme Court of Canada to have been inadequate. The court concluded that the mechanism left LPP vulnerable and at risk leading to a contravention of sections 7 and 8 of the Canadian Charter. Sections 62, 63 and 64 of the Canadian Act, among other

provisions, were consequently, struck down by the court in so far as they applied to lawyers.

[241] In coming to its findings that LPP was not adequately protected within the legislative framework, the court applied its previous decision in **Lavallee**. It made these observations:

i. the provisions wrongly transfer the burden of safeguarding LPP to lawyers;

ii. nothing requires notice to clients, and so, a client may not be aware that his or her privilege was threatened;

iii. there is no protocol for independent legal intervention when it would not have been feasible to notify a client;

iv. a judge had no discretion to assess a claim of privilege on his or her motion;

v. unless the search is of a lawyer's home office, nothing required prior judicial authorisation;

vi. examining and copying documents would have proceeded until privilege was asserted - an approach that considerably elevated the risk of breach of privilege; and

vii. claiming privilege required revealing a client's name and address even though that information may be subject to privilege.

[242] In the light of the observations of the court and the principles enunciated in **Lavallee** and **Canada v FLSC**, it may safely be concluded that the protection of LPP in our Regime is far more inadequate. Indeed, there is absolutely no statutory mechanism designed by Parliament to safeguard LPP as in the Canadian Regime, which was still found to be wanting. The GLC Guidance has sought to fill that gap left wide open by Parliament, by requiring regulated attorneys-at-law to segregate documents to avoid disclosure of privileged information. This is putting the burden on the attorney-at-law to protect LPP, which was one feature of the Canadian Regime that the Canadian Supreme Court took into account in finding that LPP was not adequately protected.

[243] Similarly, there is absolutely no provision in the Regime for any notice to the client to whom privilege belongs. Client information can be shared without their knowledge or consent. In Canada, at least some provision was made for notice to be given, albeit through FINTRAC. That procedure was, nevertheless, rejected by the Supreme Court of Canada as being unsatisfactory. In our case, no provision is made, not even an unsatisfactory one, for notification to the client. Also, as found in Canada to have been an unacceptable state of affairs, there is no protocol in the Regime for independent legal intervention in situations where it may not be proper, prudent or feasible to inform a client.

[244] Above all else, and even more significantly, in my view, there is no provision for judicial intervention relating to potential disputes concerning LPP within the context of the enforcement of the Regime by the GLC. Indeed, nothing relating to the GLC's function under the Regime requires prior judicial authorisation. The absence of this facility becomes even more glaring in the light of the power to conduct special examinations in respect of attorneys-at-law who are suspected of non-compliance in declaring their activities.

[245] Despite the evident weaknesses and deficiencies in the Regime, the Full Court, having examined the two significantly instructive Canadian authorities, was content to hold that they were of no assistance to the appellant's case. It arrived at this position because of what it perceived to be distinguishing features in the Regime that serve to protect LPP.

[246] The Full Court concluded, among other things, that because a regulated attorney-at-law is given an opportunity to sort the information and should only hand over for examination and copying, materials which are not subject to LPP, the danger of the erosion of LPP should be averted. It also found that the Regime does not threaten LPP because examinations will only be carried out upon prior notice being given to regulated attorneys-at-law and with their consent. These are features that it said have served to distinguish the Regime from the Canadian Regime that was considered in **Canada v FLSC**. This view is not accepted for reasons that will now be outlined

(further consideration is given to this issue in treating with the issue of whether the Regime authorises 'warrantless' searches below).

[247] In the first place, the measure implemented by the GLC to safeguard LPP is grossly inadequate, especially given the fact that, as already demonstrated, the question of what is privileged information, especially that attracting legal advice privilege, is not always easy to determine. Therefore, attorneys-at-law (and even the GLC) may differ as to what information should enjoy the privilege. The experience, knowledge and competence of attorneys-at-law vary, and so, there is much to be learnt from the adage, "doctors differ, patients die". Allowance should, therefore, be made for the possibility of unintended disclosure of privileged information or documents without the client's consent, through ignorance, inexperience, mistake, carelessness, fear of prosecution, or sheer incompetence.

[248] The information or documents so disclosed may, in some situations, be shared with other third parties, without the client's consent. It is the disclosure of the privileged information, without the client's knowledge and permission, in which the danger to LPP lies, and not just merely in its disclosure, without more, to the GLC or any other person.

[249] In so far as the issue of consent is concerned, the POCA has not expressly stated that the permission of regulated attorneys-at-law is required for the GLC to exercise its functions under the Regime. The GLC is given what would appear to be unfettered power to examine and inspect the business operations of regulated attorney-at-law to ensure compliance with the Regime, except that LPP must not be violated. There is

nothing to indicate that Parliament intended that regulated attorneys-at-law must give consent for the execution of the functions of the GLC, and that is highly doubtful. Barring one exception, as indicated above, as it relates to the training of staff, the only provision made in the POCA to treat with failure by the regulated attorneys-at-law to comply with the monitoring requirements of the Regime is criminal sanction, albeit that it does not preclude the GLC from also taking disciplinary action.

[250] It seems to be the clear intention of Parliament that regulated attorneys-at-law are to be criminally punished for failure to comply with the Regime. The provision of criminal sanction for non-compliance with the directives of the GLC is not consistent with a system that is designed to be based on consent. If at all consent is made a pre-requisite, it would be the GLC that would be limiting the powers conferred on it to carry out its mandate under the POCA. This could well prove counterintuitive and not in keeping with the intention of Parliament. Given the provision of criminal sanctions for non- compliance with the Regime, it cannot properly be said that attorneys-at-law, and moreso regulated attorneys-at-law, have a genuinely free choice to disobey the GLC in carrying out its mandate under the Regime. They can only do so at their peril, which includes a threat to the liberty and security of their person.

[251] The Full Court also took into account, as a further significant distinguishing feature of the Regime, the fact that it is the GLC that would have access to the business operations of regulated attorneys-at-law, unlike in the Canadian Regime under consideration in **Canada v FLSC**, where access was by state agents. The involvement

of the GLC, it opined, is a safeguard that balances the objectives of the Regime to combat money laundering and terrorist financing with the need to protect LPP. It concluded that the involvement of the GLC minimises or alleviates the risk of breach of LPP, and so LPP is protected.

[252] This view of the Full Court is, however, not altogether acceptable upon closer scrutiny of the Regime and the role of the GLC in connection with its enforcement. The role of the GLC is not, in and of itself and without more, a significant factor going to the protection of LPP, as the Full Court opined. LPP applies to an attorney-at-law sharing confidential client information with a third party, including another attorney-at-law, without the client's consent. Therefore, the GLC, like any other third party, generally, has no legal right to see privileged or confidential communication between an attorney-at-law and his client, without the consent of the client to whom the privilege belongs. It may only do so in circumstances which are recognised as exceptions to the general rule. The GLC recognises this fact that it is not entitled to have sight of privileged information. Section 91A(3) of the POCA specifically states that none of the provisions pertaining to the role and function of the GLC (like the other competent authorities) should be construed as requiring the disclosure of privileged information. In fact, given that there is now an express constitutional right to privacy of communication or correspondence, this restriction is even greater.

[253] Furthermore, the Regime provides that the GLC may act through third party agents, who may not be attorneys-at-law. The GLC Guidance expressly states that

accountants and other agents will be involved in its examination processes in carrying out its monitoring role under the Regime. Disclosure of privileged material to such persons is a violation of the client's right to LPP and privacy, in general.

[254] It is also observed that although a part of the function of the GLC is regulatory, there is, indisputably, a significant and overriding law enforcement component to its functions as a competent authority. The statutory purpose is not exclusively internal, in the sense that the GLC's role is to regulate the compliance of attorneys-at-law with the Regime, through the independent exercise of its authority, as it sees fit. That autonomous authority would have involved full control over the imposition of sanctions for non-compliance, including the right to prescribe the type of sanctions, without regard to the provisions of the POCA providing otherwise.

[255] The only aspect of the Regime which falls to be sanctioned by the GLC (and only if that is specifically provided for it to do so), without there need to be any regard to the criminal law, relates to the obligations of regulated attorneys-at-law to provide their employees with training. In this regard, regulation 6(1)(c) provides:

> "6. – (1) No regulated business shall form a business relationship, or carry out a one-off transaction, with or for another person unless the regulated business –
>
> (a) …
>
> (b) …
>
> (c) provides such employees from time with training in the recognition and handling of transactions

> carried out by, or on behalf of, any person who is, or appears to be, engaged in money laundering."

[256] Regulation 6(3) (as amended), then provides:

> "Proceedings for an offence under paragraph (2) shall not be taken against a person for failure to comply with paragraph (1)(c) where another enactment provides for disciplinary or regulatory action that may be taken by the competent authority concerned in respect of the failure and the competent authority opts to take such action in the particular case."

[257] Apart from this one aspect of the regulatory function, where the GLC may be permitted to exercise its independent judgment in dealing with non-compliance (if it makes provision for so doing), all other non-compliance by regulated attorneys-at-law with the Regime falls within the criminal sphere for punishment by a court of law.

[258] The even more troubling fact is that the GLC is also empowered to share information with state agents and other analogous bodies of a foreign state. Even if there is no direct access by state agents and other authorities to information garnered during the examination exercises, there can be indirect access by them through the GLC's sharing of information with them. There is no exclusivity in the exercise of the power of the GLC.

[259] The function of the GLC in the Regime is, therefore, designed to constitute an integral part of the state apparatus for combating money laundering and to do so through the engagement and application of the criminal law to attorneys-at-law.

[260] The role of the GLC is, at the bottom line, for a criminal law purpose in ensuring the effectiveness of the Regime, which is not, as Cromwell J observed in **Canada v FLSC**, "an administrative law regulatory compliance regime". To borrow the words of His Lordship, "the regulatory aspects serve criminal law purposes". This means that its role extends beyond being merely regulatory for the benefit of regulated attorneys-at-law and the public they serve.

[261] The permissible interaction between the GLC and other third parties (including agents of foreign states) in carrying out its monitoring function, and with there being no provision for independent legal and/or judicial intervention before disclosure of information taken from the business operations of regulated attorneys-at-law, substantially weakens any safeguard for LPP at which the involvement of the GLC may have been aimed.

[262] The interest of the GLC in the business operations of the regulated attorneys-at-law under the Regime is, essentially, a function and interest of the state in the detection and prevention of money laundering and terrorism financing. It affords no meaningful protection from state intrusion on attorney-at-law/client confidentiality and, by extension, LPP. I would say, in borrowing the language, of Cromwell J in **Canada v FLSC**, that there is no basis for thinking that privileged attorney-at-law/client communication should be more vulnerable to non-consensual disclosure and taking in the course of the GLC examination of the business operations of attorneys-at-law than it would be in the course of any inspection conducted by law enforcement authorities.

[263] The fact that the GLC may have the intention to seek the intervention of the court does not remedy the deficiencies in the statutory framework in this regard. This is, simply, because the POCA has made no provision for access to the court by the GLC to secure compliance, outside of the criminal law machinery, and no provision is made for the client to safeguard his interest. As reasoned in **Lavallee**, the fact that competent counsel will likely assert blanket privilege at the outset does not obviate the state's duty to ensure sufficient protection of the rights of the privilege holder - the client. A reasonable opportunity to ensure that privileged information remains so must be given to the privilege holder and not to the privilege keeper. It cannot be assumed that the lawyer is the alter-ego of the client. The Regime has not given clear recognition to the need to ensure the interest and right of the privilege holder, even though the GLC is the competent authority.

[264] It is also noted that the logistics for the implementation of the Regime, concerning the examination of the businesses of regulated attorneys-at-law, are left to the sole discretion of the competent authority. For now, the regulatory body for attorneys-at-law is the competent authority, but what if that is to change tomorrow by Ministerial Order, as it can be? A newly designated competent authority could implement its measures for compliance, which could differ from those of the GLC. It could well make different demands on regulated attorneys-at-law during examination. There could be no argument of protection being given by the regulatory body for attorneys-at-law.

[265] I share, in principle, the views expressed by Sykes J (as he then was) at paragraph [29] of his judgment, dealing with the application for an injunction in this case and reported as, **The Jamaican Bar Association v The Attorney General and The General Legal Council** [2014] JMSC Civ 179. There he stated:

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

[266] I adopt the observation of Sykes J as to whether any other person or entity appointed as competent authority would be properly equipped to manage effectively circumstances where LPP is claimed, in the absence of clear statutory guidelines. Indeed, one will never know if the passive conciliatory approach which is to be built on consent, as the GLC intends, may not need to be altered as time progresses and challenges are thrown up in the operation of the system it has designed. The GLC or any other person or body appointed as the competent authority may well have to reconsider and adjust this conciliatory approach if confronted with uncooperative attorneys-at-law. This eventuality of a change in strategy carries with it the risk of possible encroachment on the boundaries of LPP during the monitoring process. The protection of LPP should not be left to chance or the whim and fancy of a competent authority, whoever that may be. Therefore, a proper mechanism for the greater

protection of LPP must be designed so that it can be insulated from overreach by whoever is the competent authority.

[267] I conclude that the appointment of the GLC as the competent authority for regulated attorneys-at-law does not avert, in any profound and significant way, any danger or risk to LPP, as the Full Court opined.

(f) LPP and the disclosure to the FID

[268] There is also the requisite disclosure by regulated attorneys-at-law of suspicious transactions to the FID, which carries with it an inherent risk to LPP. In the case of firms, the nominated officer is expected to make reports to the FID. A sole practitioner would have to do so on his own behalf. The FID, upon receiving this information, may do with it as it pleases because there is no express prohibition on use in the POCA which would enure to the benefit of the client. On a perusal of the suspicious transaction report form which is to be completed, it is seen that the regulated attorney-at-law is required to provide information as to his suspicions and reasons for them. The amended Regulation now requires that correspondence be provided along with analysis of the transaction involved. Furthermore, upon the form having been submitted, the FID may request further information (which is not defined in the Regime), from regulated attorneys-at-law. The POCA, specifically, provides that a regulated attorney-at-law, having made the disclosure, of his suspicion and the bases for it, is prohibited from making the fact of this disclosure known to the client or the client's representative.

[269] The disclosure of suspicious transactions to the FID cannot be taken, as the Full Court has done, to evoke the operation of the exception to LPP. Suspicion, without more, does not equate to the actual commission of a crime; the furtherance of a crime; or the intention to further a criminal intent, so as to invoke the exception to LPP. Regulated attorneys-at-law are required to report any transaction that is not in keeping with the known profile of the client or which has "red flag" indicators. Such transactions, although unusual or giving rise to red flags, do not necessarily have to be connected to criminal activities, including money laundering and terrorism financing.

[270] The evidence of Mr Stephens given on behalf of the 1st respondent supports this conclusion. He deposed that there have been over 200 reports made by financial institutions concerning suspicious transactions involving attorneys-at-law, but up to the time of his affidavit, only two arrests of attorneys-at-law had been made. Furthermore, he has not spoken to the arrest and conviction of any client related to those transactions. There is, therefore, no 'open and shut case' of criminality upon a suspicious transaction report, regardless of the high *mens rea* requirement for reporting.

[271] Also, the POCA provides under section 94(5) that an attorney-at-law would not be guilty of an offence of failure to make a disclosure if the information or matter came to him in privileged circumstances. This means that communication that could give rise to suspicion and, therefore, prima facie, be disclosable to the FID, could arise under privileged circumstances. Had there not been a possibility that privileged information

could be transmitted through suspicious transaction reports, the legislature would have had no need to expressly provide a defence based on privilege and to provide that the section is not to be construed as rendering privileged document disclosable.

[272] Therefore, it cannot be safely concluded that communication to the FID about suspicious transactions, will "almost invariably" not engage LPP because of the high *mens rea* threshold and the operation of the exemption. Such a conclusion would not be accurate in law. This is so because the same high *mens rea* threshold, that applies to regulated attorneys-at-law also applies to financial institutions but there is no convincing evidence from Mr Stephens that suspicious transaction reports "almost invariably" leads to a finding of criminal activities or an intention to further criminal activities.

[273] The substantive right of a client to confidentiality, in respect of his communication with his attorney-at-law, may be raised in any circumstances where such communications are likely to be disclosed without the client's consent (see **Descôteaux et al v Mierzwinski** [1982] 1 SCR 860). Where no provision is made for the effective protection of this substantive right, which has been elevated to a constitutional right, being a component of the rights to privacy, the court must be extremely vigilant in safeguarding it. The making of suspicious transaction reports to the FID calls for such an approach.

[274] As in the case of the GLC powers, there are cases, which illustrate that Parliament could have taken steps to provide a more effective protection to LPP, within

the context of suspicious transaction reporting to the FID. The case of **Michaud v France** application no 12323/11, final judgment delivered 6 March 2013, is one such case. This case demonstrates a robust procedural framework for the protection of LPP, within a democratic state, which guarantees the right to privacy. Like **Lavallee** and **Canada v FLSC**, it serves to highlight the weaknesses in the Regime that have the effect of rendering LPP vulnerable. This case is helpful for several reasons, as shall be demonstrated at other points in this judgment, but for present purposes, the focus will be on the ECtHR's treatment of the mechanism in place for the protection of LPP in the French Regime, which was under consideration.

[275] In that case, the applicant was a member of the Paris Bar and the National Bar Council ("the Bar Council"). The European Union had adopted measures aimed at preventing the use of the financial system for money laundering. The implementation of those measures was a part of France's international obligations to combat money laundering and terrorist financing. The relevant Directives of the European Union were transposed into French law. The AML/CFT measures were extended to lawyers, requiring them to, among other things, "report suspicions". Provisions were made, generally, for these reports to be made to the country's Financial Intelligence Unit ("FIU"). A separate scheme, however, was devised for lawyers for them not to report directly to the FIU but, rather, through their professional regulatory body.

[276] The Bar Council, the regulator for lawyers (the equivalent to the GLC), took a decision adopting regulations on internal procedures for implementing the obligations

under the French Regime to combat money laundering and terrorist financing. It applied the rules to specific activities by lawyers, similar to those specified in the DNFI Order, and created an internal supervisory mechanism to guarantee compliance with those procedures. The disciplinary scheme was founded on the professional or administrative rules to be instituted by the competent supervisory authority. Failure to comply attracted disciplinary sanctions.

[277] The applicant took issue with the suspicious reporting obligations and applied for the Bar Council's decision, imposing that obligation, to be set aside. Among his complaints, in so far as is immediately relevant, was that the decision was incompatible with Article 8 of the Convention as the obligation to report suspicions jeopardised LPP and the confidentiality of exchanges between lawyer and client.

[278] Article 8, which is more or less, the equivalent provision to section 13(3)(j) of the Charter, provides:

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

[279] The court, in determining whether the measures imperilled LPP complained of, opined that Article 8 of the Convention protects LPP and that there was an infringement of Article 8 by the requirement to report suspicions. The court concluded that the

obligation to report suspicions amounted to a "continuing interference" with the applicant's enjoyment as a lawyer of the rights guaranteed by Article 8. This interference, it said, existed, even if it was not the applicant's private life that was affected but his right to respect for his professional exchanges with his clients [paragraph 92]. As a consequence of the infringement of the right to privacy, the Government was required to justify the violation.

[280] In looking at the question of whether the Government had justified the infringement, the court examined, among other things, the mechanism that was in place to protect LPP. It concluded that LPP was safeguarded based on two factors and so was not imperilled by the Bar Council's decision. One of the factors that led the court to the conclusion that LPP was not left vulnerable, which is notably relevant for present purposes, was what was contended by the Government to be the "maximum procedural guarantees". These guarantees were achieved by making the self-regulating body, the filter between the reporting lawyers and the FIU.

[281] The court noted that lawyers did not transmit reports directly to the FIU but, as appropriate, to the President of the Bar Council of the *Conseil d' Etat* and the Court of Cassation or to the Chairman of the Bar of which the lawyer is a member. These persons would determine what reports were to be made to the FIU. There was, therefore, by law, a "filtering role" conferred on the professional self-regulating bodies, which was accepted by the court as being part of a framework that provided adequate protection for LPP.

[282] When the French Regime as it relates to suspicious transaction reporting is juxtaposed alongside the Regime, it is indisputable that there is no statutory "maximum procedural guarantee" in the Regime, whether in the form of a filter akin, to that of the French Regime, or otherwise, to safeguard LPP. The GLC has offered as much guidance as it reasonably can concerning suspicious transaction reporting, however, there is no statutory power conferred on the GLC or the President of the Bar Associations to act as a filter for the disclosure of client information. Bearing in mind that the GLC is not statutorily authorised to have sight of suspicious transaction reports, the question arises as to the nature and extent of the assistance that it could provide regulated attorneys-at-law in this regard to safeguard LPP.

[283] As in the case of the GLC examinations, the responsibility of protecting LPP, during the context of suspicious transaction reporting, lies exclusively on the shoulders of the regulated attorneys-at-law, with all the attendant drawbacks already alluded to. I find it necessary to reiterate that the obligation to report suspicions does not, without more, give rise to the exemption from privilege, and so, information which ought properly not to be disclosed could be disclosed in discharging this obligation.

[284] The other safeguard, which led the ECtHR to find that the reporting obligations did not imperil LPP, was that the law strictly controlled the disclosure of the information that reached the hands of the FIU. There is no provision in the POCA for the protection of private information that may be disclosed to the FID as part of the suspicious

transaction reporting scheme. This risk is even more heightened by the absence of data protection law in Jamaica.

[285] There is enough for one to conclude that the weak or inadequate framework in the Regime for the protection of LPP has left it vulnerable and at risk of erosion, where suspicious transaction reporting is concerned.

Conclusion on the effect of the Regime on LPP as a component of the right to privacy

[286] As noted by the Full Court, LPP is not an absolute right but is, nevertheless, a fundamental human right which is afforded added protection by section 13(3)(j) of the Charter. Therefore, once information is subject to LPP, such a privilege is absolute and is not to be overridden by some countervailing rule of public policy, unless the right is waived or it involves the seeking of advice to enable the commission of a crime or the like offence (see **R (on the application of Prudential Plc and another) v Special Commissioner of Income Tax and another** [2013] UKSC 1 at paragraph [120]).

[287] It is an entrenched principle in every free and democratic society that LPP is for the client's benefit and is his only to waive. Unless there is provision for the client to have an input at some appropriate stage, be it by himself, independent counsel or a judge, as to what confidential information may be disclosed to others, LPP can never be said to be adequately protected. This is because LPP is for the benefit of the client and not his attorney-at-law.

[288] Any measure which whittles away the right of the client to have the privilege protected, particularly, in circumstances such as these, where the legislative intent is that it be protected, must be found to have eroded LPP or, at least, placed it at grave risk. This is because one of its fundamental tenets would be destroyed or gravely undermined. It cannot be said, with any degree of conviction, that the Regime does not have that effect on LPP.

[289] It is imperative that the provisions for the protection of LPP, a fundamental human right, should be found in the principal statutory framework of the POCA itself, and not only in the guidelines to be formulated by a competent authority or through the devices of the regulated attorneys-at-law themselves. The POCA itself must provide a concrete, clear, definitive, consistent, effective and fair mechanism for the protection of LPP. This absence of a statutory mechanism to safeguard LPP is wholly unacceptable given its immense and indispensable value in a free and democratic society.

[290] The Full Court's conclusion that in the very limited circumstances where LPP may arise, there are sufficient safeguards in place in the Regime that would protect it, is not supported upon close scrutiny of the Regime. The Full Court erroneously and narrowly focused on the concept of LPP as being "closely tied to the administration of justice and the duty of an attorney to the court", which led to its conclusion that "there will be no privilege if a communication is between a lawyer and client for purely business and or financially related transactions" (paragraph [131] of the judgment]. That is a dangerously broad generalisation, which ignores the fact that legal advice privilege, as

distinct from litigation privilege, may arise in an out-of-court context and connected to business or financially related transactions. LPP is not restricted to the duty of an attorney-at-law to the court.

[291] The GLC's involvement in the enforcement of the Regime, even if it minimises the risk posed to LPP, does not do so to any appreciable extent to render the risk so minuscule that it could be safely ignored.

[292] With all the glaring deficiencies in the Regime, which strike at the very heart of LPP, it cannot be said, on the strength of the various authorities reviewed, that Parliament has managed to keep LPP "as close to absolute as possible" by putting in place "stringent norms to ensure its protection". LPP is bound "to fall through the interstices of the inadequate mechanism" devised by the GLC for documents to be segregated and the absence of any filtering mechanism in the POCA, itself, for the reporting of suspicions. In the absence of a structured statutory framework, which expressly sets out stringent rules or guidelines, carefully designed to guarantee the effective protection of LPP, it cannot comfortably be said that LPP is not left vulnerable by the Regime.

[293] It is for all these reasons (and others not specifically stated at this juncture but which form part of my analysis at later points in this judgment) that I find that the Full Court erred in coming to its conclusion that although the "spectre of LPP looms large from the perspective of the [appellant], analysis reveals that it plays an insignificant role".

[294] It would have also erred in concluding that it has not been established by the appellant that the powers given to the GLC and the FID have left LPP vulnerable or eroded.

[295] This finding as to the adverse effect of the Regime on LPP is of critical relevance to the question of the Regime's impact on the constitutional right to privacy. The Full Court found that the right to privacy under section 13(3)(j)(ii) and (iii) of the Charter is adversely impacted, albeit that LPP is adequately protected. In the light of my finding that the Regime does not sufficiently and effectively protect LPP, the question arises as to the sustainability of the finding of the Full Court that there is only minimal impairment of the rights to privacy. This question is determined later in this judgment as part of the analysis of whether the Regime is within proper limits and is demonstrably justified in a free and democratic society.

[296] This position taken to examine the effect of LPP within the context of analysing justification is fully in line with that of Lord Hoffmann in **Regina v Special Commissioner and another, Ex p Morgan Grenfell & Co Ltd**, expressed in these words at paragraph 39:

> "...[T]he European Court of Human Rights has said that LPP is a fundamental human right which can be invaded only in exceptional circumstances: see *Foxley v United Kingdom* (2000) 31 EHRR 637, 647, para 44. Mr Brennan said that the public interest in the collection of the revenue could provide the necessary justification but I very much doubt whether this is right. Nor is it sufficient to say simply that the power is not used very often. That is no consolation to the person against whom it is used. If new legislation is passed, it will have to be seen whether it is limited to cases

> in which the interference with LPP can be shown to have a legitimate aim which is necessary in a democratic society."

[297] It suffices to say at this juncture that the rights to privacy of regulated attorneys-at-law under section 13(3)(j)(ii) and (iii) are adversely impacted through the vulnerability of or the clear risk posed to LPP, which must be justified by the Government.

Issue (v)

Whether the Full Court erred in its finding that the Regime does not infringe regulated attorneys-at-law's (and/or) their client's constitutional right to liberty and security of the person (grounds (h) (in part), (t) and (u))

[298] Another complaint of the appellant is that the Regime limits the liberty rights of regulated attorneys-at-law and their clients in a manner contrary to the principles of fundamental justice, which includes the commitment of attorneys-at-law to their clients' cause and the Full Court was wrong not to so find. This interference with the liberty rights, the appellant contended, has rendered the Regime inconsistent with the independence of the Bar. According to it, the principle of fundamental justice should be recognised as a principle that limits any abrogation of Charter rights as was recognised in **Canada v FLSC**.

[299] The main argument of the appellant is that a threat of imprisonment, even in the context of legislation, is a deprivation of liberty and the Regime has threatened the liberty interests of regulated attorneys-at-law in this way. The liberty of the regulated attorneys-at-law is jeopardised because the Regime allows for their imprisonment as a sanction for non-compliance with its provisions. The clients, it says, are jeopardised on

the basis of confidential information being obtained by their attorneys-at-law, which is subject to LPP, but which may be made available to law enforcement authorities and other third parties under the Regime. The information, so obtained, may be used against them, thereby threatening their liberty.

[300] In its analysis of this issue, the Full Court used as its yardstick the question of whether the impugned provisions of the Regime are, "arbitrary in their application, lack legal certainty and are disproportionate regarding deprivation of liberty" (paragraph [263] of the judgment). After the consideration of that question, within the context of section 13(3)(a) of the Charter, and the impugned provisions of the Regime, it answered it in the negative.

[301] In arriving at that position, the Full Court reasoned that the obligations under the Regime do imperil the liberty interests of regulated attorneys-at-law, as failure to comply with the relevant statutory provisions expressly constitute criminal offences for which they may be imprisoned. It conducted a comprehensive examination of the Jamaican and Canadian Charter provisions as well as authorities from the European Court of Human Rights ("the ECtHR"), treating with Article 5 of the Convention. It then concluded that there is no arbitrary or unjustified deprivation of liberty occasioned by the Regime. The enforcement of the Regime, it stated, "is based on legal certainty" (paragraph [300] of the judgment).

[302] These findings of the Full Court are rooted in its view that any deprivation of liberty under the Regime would only be deprivation after a conviction and sentence

following due process, and so, would "fall squarely within the provided exception in section 13(3)(a)", which is, in the execution of a sentence of a court (paragraph [300] of the judgment).

[303] The Full Court also rejected the appellant's contention that the threat of imprisonment, occasioned by the Regime, suffices to constitute a breach of the liberty rights guaranteed by the Charter. In this regard, it reasoned at paragraph [299]:

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

[304] The Full Court also concluded that the Canadian jurisprudence, which treats with the right to liberty under section 7 of the Canadian Charter, cannot be directly applied to the interpretation of section 13(3)(a) of the Charter. The Full Court maintained that it would be erroneous to read into section 13(3)(a) of the Charter the concept of "principles of fundamental justice", which would, it said, "add another qualifier to that provision" that was not intended by the framers of the Charter. According to it, the

Canadian Charter uses principles of fundamental justice to dictate how deprivation or impairment of liberty can be effected. In contrast, section 13(3)(a) of the Charter does not provide such a mechanism.

[305] The appellant's complaint is that the Full Court adopted an erroneous analysis of section 13(3)(a) by limiting its meaning to when a conviction has occurred and by reference to section 7 of the Canadian Charter, without reference to any analysis of the actual words of the Charter. It also contended that the Full Court focused solely on the right not to be deprived of liberty and not on the separate and distinct right - the right to liberty.

[306] The respondents do not agree that the Full Court was wrong to find that there is no infringement of the liberty rights of regulated attorneys-at-law and their clients for the reasons it gave. They endorse the reasoning of the Full Court. They contended that the case of **Canada v FLSC** is distinguishable and does not assist in the interpretation and application of the Charter.

Analysis and findings

[307] I accept the conclusion of the Full Court, which reflects the respondents' submissions that there is no need for our courts to transpose the Canadian Charter qualifier of, "except in accordance with principles of fundamental justice", into the section 13(3)(a) analysis. The Full Court was also correct to reject the principle relied on by the appellant of an attorney-at-law's "commitment to their clients' cause" as a

relevant consideration in its analysis of whether the liberty rights of regulated attorneys-at-law are being breached or are likely to be breached by the Regime.

[308] I do find, however, that the appellant's complaint concerning the Full Court's treatment of the issue of whether there is a breach or likely breach of the liberty rights of regulated attorneys-at-law and their clients is not all devoid of merit.

[309] In my view, the Full Court erred in law in its analysis on these fronts:

i. Restricting its analysis to the right not to be deprived of liberty to the exclusion of the right to liberty;

ii. Limiting the threat to the liberty interests of regulated attorneys-at-law as being only in the form of imprisonment following conviction;

iii. Finding that the Regime is constitutional because (a) the obligations and offences it has created are appropriate; and (b) the penalty provisions accord with section 13(3)(a) of the Charter because of the Regime's protection of LPP and its minimal interference with confidentiality and privacy; and

iv. Finding that there is "no infringement of the constitutional entitlement to liberty" as any deprivation of that liberty would fall squarely within section 13(3)(a) of the Charter.

Each of these matters will be considered in turn.

(a) The restriction of focus to the right not to be deprived of liberty

[310] A thorough reading of the Charter reveals that section 13(3)(a) not only protects the right not to be deprived of liberty but also the fundamental rights to life, liberty and security of the person. It is well-established that along with the right to life, the right to liberty is one of the most valued of all human rights. In **Maneka Gandhi v Union of India** 1978 AIR 597, the Supreme Court of India, in discussing the expression, "personal liberty", within the ambit of Article 21 of the Constitution of India, explained that personal liberty is of the "widest amplitude" and covers "a variety of rights which go to constitute the personal liberty of man". Hence, the right to liberty should be twinned with the right not to be deprived of it.

[311] By focusing only on the right not to be deprived of liberty and the qualifier in section 13(3)(a), the Full Court excluded from its contemplation the simple and fundamental right to be free from impositions on one's personal liberty. One need not be deprived of one's liberty for there to be a violation or threatened violation of one's basic but fundamental right to be free from restraints. Hence the need to view each right separately and distinctly from each other, albeit that they are intertwined.

[312] Furthermore, the right to liberty and the right not to be deprived of it, guaranteed by section 13(3)(a), are, in my view, close 'siblings' of the right to freedom of the person, which is protected under section 13(3)(p) of the Charter. They may, in my view, be appropriately regarded as the "triplet liberty rights". The appellant did not

rely on section 13(3)(p), however, given the intricate connection between it and section 13(3)(a), it ought not to have been overlooked.

[313] The right to freedom of the person guaranteed by section 13(3)(p) does not have an identical counterpart in the Convention and is not in the same wording as Article 5 of the Convention or section (13(3)(a). It comprises a liberty right, which is explicitly made subject to section 14 of the Charter. It, therefore, provides a direct "gateway" to section 14, which as will be seen, is directly related to section 13(3)(a).

[314] Section 14(1) states, in part, in so far as is immediately relevant to these proceedings:

> "**14.-(1)** ***No person shall be deprived of his liberty*** **except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances** -
>
> (a) in consequence of his unfitness to plead to a criminal charge;
>
> (b) **in execution of the sentence or order of a court whether in Jamaica or elsewhere, in respect of a criminal offence of which he has been convicted**;
>
> (c) in execution of an order of the Supreme Court or of the Court of Appeal or such other court as may be prescribed by Parliament on the grounds of his contempt of any such court or of another court or tribunal;
>
> (d) in execution of the order of a court made in order to secure the fulfilment of any obligation imposed on him by law;

(e) for the purpose of bringing him before a court in execution of the order of a court;

(f) the arrest or detention of a person –

(i) for the purpose of bringing him before the competent legal authority on reasonable suspicion of his having committed an offence; or

(ii) where it is reasonably necessary to prevent his committing an offence;

(g) ... ;" (Emphasis added)

[315] The underlined portion in bold in the excerpt above shows explicit reference to the right not to be deprived of liberty provided for in section 13(3)(a). The Charter does not expressly provide the basis for the distinction between the liberty rights under section 13(3)(a), and the right to freedom of the person, under section 13(3)(p). Neither does it expressly provide the basis for not making section 13(3)(a) directly subject to section 14, as in the case of section 13(3)(p). That notwithstanding, it is evident, on a reading of section 14, that although section 13(3)(a) is not made directly subject to it, the provisions are intimately connected and should be read in the light of each other. I would adopt the words of the GLC in its written submissions that, "[t]he general liberty right stated in s13(3)(a) receives more detailed articulation in s14 (dealing with liberty of the subject) and s16 (dealing with due process)".

[316] Section 14 treats with the right of a person not to be deprived of his liberty as expressed under section 13(3)(a). It is in section 14 that the right not to be deprived of one's liberty is reinforced but made subject to additional qualifiers not mentioned in section 13(3)(a). Section 14 states that the rights may be limited on other grounds

other than that stated in section 13(3)(a), provided that the grounds for doing so are reasonable and are in accordance with fair procedures laid down by law.

[317] One circumstance in which a person may be deprived of his liberty, subject to the qualifier in section 14, is in the execution of an order of a court in respect of a criminal offence of which he has been convicted (the same qualifier stated in section 13(3)(a)). He may also be deprived of his liberty upon his arrest or detention for the purpose of bringing him before the competent legal authority on reasonable suspicion of his having committed an offence.

[318] Section 14(2) and (3) also provides for certain procedural safeguards to be observed where a person is deprived of his liberty under the prescribed circumstances. Some of the safeguards governing the deprivation of the liberty of a person include:

i. the right to communicate with and be visited by specified persons;

ii. the right to be informed at the time of arrest or detention or as soon as is reasonably practicable in a language which he understands, the reasons for his arrest or detention;

iii. the right to be informed in language which he understands of the nature of the charge;

iv. the right to communicate with and retain an attorney-at-law and the entitlements to be tried within a reasonable time;

v. the right to be brought before the court or an officer authorised by law without delay upon detention or as soon as is reasonably practicable; and

vi. the right to be released on bail either unconditionally or upon reasonable conditions.

[319] Section 14(5) also states that any person deprived of his liberty shall be treated humanely and with respect for his inherent dignity.

[320] There is also section 13(9), of the Charter, which allows for deprivation of liberty in other circumstances, such as during a period of public emergency or public disaster, which are not immediately relevant to this analysis. It is only raised to show that in treating with section 13(3)(a), the Charter must be read as a whole because there are other provisions which affect the right to liberty and the right not to be deprived of liberty and there are qualifiers other than the one specified in section 13(3)(a).

[321] The various provisions of the Charter relating to the right to liberty have established, beyond question, that the liberty rights that are guaranteed by section 13(3)(a) are not at all absolute, as limitations may justifiably be placed on them in accordance with the Charter. For this reason, the appellant's contention that a proper analysis of the rights under the Canadian and Jamaican Charters "...result in the conclusion that our Constitution grants unqualified rights not subject to the vague test of reasonableness or in any way restricted as concluded by the Court" (ground (u)), lacks merit. The rights to liberty are specifically qualified by the Charter. Had that not

been so, no one could be detained or arrested prior to conviction for a criminal offence or for any other reason.

[322] To make good sense of the Charter and to give full protection to the rights it seeks to guarantee, while also giving effect to the right of the state to limit these rights, section 13(3)(a) must, of necessity, be read in conjunction with sections 13(3)(p), 14 and 16. It should also be recognised that the section 13(3)(a) qualifier, employed by the Full Court in its analysis, is also listed in section 14. It is made subject to the overriding conditionality of "except on reasonable grounds and in accordance with fair procedures established by law".

[323] In examining the issues pertinent to section 13(3)(a), the Full Court did not explicitly focus on section 14 (section 13(3)(p), or other related provisions) of the Charter. Instead, it had regard to Article 5 of the Convention on the basis that it is similar to section 13(3)(a) of the Charter and that there is no local precedent on the respective Charter provision. Article 5 of the Convention provides, among other things, that:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> …"

[324] The circumstances listed in Article 5 in which there may be deprivation of the liberty of a person are similar (if not identical) to those enumerated under section 14(1) of the Charter. The safeguards to be observed under Article 5 are, more or less, similar to those listed in sections 14(2) and (3) of the Charter. Article 5 of the Convention is,

therefore, in effect, a combination of sections 13(3)(a) and 14 of the Charter. It also would reflect the intent of section 13(3)(p), treating with freedom of the person but it carries no identical corresponding provision to that section.

[325] In **Secretary of State for the Home Department v JJ and others** [2007] UKHL 45, it was established that the word "liberty" has a range of meanings. In a narrow sense, it may mean physical freedom to move, so that deprivation of liberty would be physical incarceration or restraint. In a wider sense, it may mean the freedom to behave as one chooses. The words deprivation of liberty, it said, should be interpreted in the narrow sense of physical incarceration or restraint. This is the sense adopted in the Strasbourg jurisprudence and applied by the Full Court.

[326] In the light of section 13(3)(p) of the Charter, providing for the right to freedom of the person, as distinct from the right to liberty, the question arises as to whether the scope of section 13(3)(a) is so broad as to extend to more than physical restraint of the person and to encompass other types of restraint on personal liberties. The inclusion of a consideration of the concept of liberty other than being confined to physical liberty would be in keeping with the views of the Supreme Court of the United States of America (the "US Supreme Court") as declared in such cases as **Poe v Ullman** 367 US 497 (1961). In speaking to the right to liberty under the Fourteenth Amendment, Justice Harlan, stated at page 367, that:

> "...[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points

> pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures and so on. **It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints,**... **and which also recognises, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the State needs asserted to justify their abridgement**...." (Emphasis added)

[327] If this court were to adopt this broader meaning adopted by the US Supreme Court to the liberty rights guaranteed by section 13(3)(a) to its analysis, undoubtedly, it would be found that the Regime has encroached substantially on the liberty rights of regulated attorneys-at-law. A close examination of the impugned provisions of the Regime reveals a substantial imposition on the freedom of regulated attorneys-at-law to make their own choices and to relate to others within the context of their business operations, which is central to their autonomy. But, as the Supreme Court of Canada, stated in **R v Edwards Books and Art Ltd** [1986] 2 SCR 713, 717, the word "liberty" as used in section 7 of the Canadian Charter is not synonymous with unconstrained freedom... whatever be its precise contours, "[it] does not extend to an unconstrained right to transact business whenever one wishes". Liberty in our Charter, therefore, must not be viewed as unconstrained freedom to do whatever one pleases, even if it is not to be restricted to physical restraint of the person.

[328] However, even if the liberty rights under section 13(3)(a) should not be given a broader connotation beyond physical restraint of the person, as the Full Court opined, there must, nevertheless, be a broad and purposive approach to the interpretation of

the Charter. This is necessary to give full effect to the liberty rights as guaranteed. This approach would be in keeping with the intention of its framers. In **Minister of Home Affairs and another v Fisher**, Lord Wilberforce pointed to the need for a, "generous interpretation" that is suitable to give to individuals the full measure of the fundamental rights and freedoms guaranteed to them by the Constitution.

[329] Accordingly, the Full Court, in adopting the narrow sense of the word liberty as meaning incarceration or physical restraint, ought to have construed section 13(3)(a) by an examination of the actual words used in that section, while having regard to the provisions of the Charter, read as a whole. Had the Full Court employed that broad and purposive approach, it would have recognised the two distinct liberty rights secured by section 13(3)(a) as well as the intimate connection between section 13(3)(a) and sections 13(3)(p) and 14. With that recognition, the even more significant similarity between Article 5 of the Convention and the Charter, would have become more evident. Similarly, the Full Court would have recognised that the Charter in treating with liberty rights is not as fundamentally different, in terms and effect, from section 7 of the Canadian Charter, as it had opined. This similarity arises from the fact that the specific qualifier in section 14 of the Charter "*except on reasonable grounds and in accordance with fair procedures established by law*", is not so far removed, if, at all it is, from the qualifier in section 7 of the Canadian Charter, "*except in accordance with the principles of fundamental justice*". Principles of fundamental justice must include reasonableness as well as substantive and procedural fairness, which is recognised by the Charter.

[330] Our constitutional framework offers no less protection to the liberty rights of persons in Jamaica than the Canadian Charter. Restriction on liberty in Jamaica must be on reasonable grounds and in accordance with fair procedures, established by law, just as it must be in accordance with principles of fundamental justice in Canada. In both jurisdictions, any deviation from those standards must be demonstrably justified in a free democracy to be constitutional. In the light of this, there is no need for this court to expend its energy, as the Full Court had done (evidently because of the appellant's reliance on the Canadian Charter jurisprudence), to distinguish between the Canadian Charter provisions concerning the liberty rights. The Full court was obliged to consider, broadly, the right to liberty of the person along with the right not to be deprived of it.

(b) Restricting deprivation of liberty to imprisonment

[331] The Full Court, in its reasoning, acknowledged that Article 5 of the Convention, like section 13(3)(a) of the Charter, is to ensure that no one should be arbitrarily deprived of their liberty and that the right is of the highest importance in a democratic society, within the meaning of the Constitution.

[332] Given the content of the right not to be deprived of liberty and its high place of value in a free and democratic society, the Full Court should have taken into account that the right is not only engaged by imprisonment, following conviction.

[333] In **Secretary of State for the Home Department v JJ**, several useful principles were delineated concerning the content and scope of the liberty rights. These principles reflect those set out in the Guide to Article 5 of the European Convention of

Human Rights - Right to Liberty and Security ("the Guide to Article 5"). The following is a summary of some of the relevant and useful principles derived from the case law surrounding Article 5.

[334] The right to liberty of the person contemplates the physical liberty of a person and also refers to the classic detention in prison or strict arrest. In ordinary parlance, a person is taken to be deprived of his or her liberty when locked up in prison or its equivalent. However, the ECtHR has made it very clear in several cases that a deprivation of liberty is not confined to the classic case of detention following arrest or conviction, but may take numerous other forms. The prohibition, it is said, has an autonomous meaning and has fallen to be considered in "a very wide range of factual situations", and so, the absence of certain features of the standard case of imprisonment - for example, locked doors or institutional surroundings - are not essential to the concept of deprivation of liberty. To be placed under actual physical constraint for any length of time is for that period a deprivation of liberty (see **Engel and others v The Netherlands** (1976) 1 EHRR 647). Article 5 is also engaged in the context of house arrests, residence and curfew orders.

[335] The task of a court, it is said, is to assess the impact of the measures in question in the situation of the person subject to them. Thus, account should be taken of a whole range of factors, such as the nature, duration, effects and manner of execution or implementation of the penalty or measure in question (see **Engel and others v The Netherlands**, paragraph 59 and **Guzzardi v Italy** (1980) 3 EHRR 333, paragraph 95).

[336] The Guide to Article 5 of the Convention also states quite importantly that:

> "25. **No deprivation of liberty will be lawful unless it falls within one of the permissible grounds specified in sub-paragraphs (a) to (f) of Article 5 § 1** [section 14(1) (a)-(f) of the Jamaican Charter].
>
> 26. **Three strands of reasoning may be identified as running through the Court's case-law: the exhaustive nature of the exceptions, which must be interpreted strictly and which do not allow for the broad range of justifications under other provisions (Articles 8 to 11 of the Convention in particular); the repeated emphasis on the lawfulness of the detention, both procedural and substantive, requiring scrupulous adherence to the rule of law; and the importance of the promptness or speediness of the requisite judicial controls** (under Article 5 §§ 3 and 4) S, V and A v Denmark [GC], § 73; Buzadji v the Republic of Moldova [GC], § 84)." (Emphasis added)

[337] The restrictive approach taken by the Full Court in its analysis of the liberty rights guaranteed by section 13(3)(a) led it to an erroneous conclusion, which serves to justify the complaint of the appellant that it erred by focusing solely on imprisonment following conviction. By doing so, it paid no regard to other forms of restraint on liberty or deprivation of liberty that could arise from enforcement of the Regime. For example, strict detention and arrest, on mere suspicion of having committed an offence, is a form of deprivation of liberty recognised by the Charter and one which could flow from the enforcement of the Regime, before a conviction for an offence.

[338] Also, the regulated attorney-at-law, at the end of the enforcement process, could even be acquitted and not face imprisonment but his right to liberty and his right not to be deprived of it, could have been derogated from during the process. For example, his

mere engagement by the police for questioning, however brief, could affect his right to liberty. So too would be his surrender to the custody of the court, in answer to a criminal charge connected to the Regime.

[339] The fact that the appellant may have raised the provisions, regarding imprisonment as being the issue affecting their liberty, cannot absolve the Full Court from thoroughly examining the effect of the Regime on the Charter rights that are engaged, once a claim of contravention is raised. This is in keeping with the role of the Court as the guardian of the Constitution and the ultimate protector of the rights and freedoms it guarantees.

(c) The appropriateness of the obligations, offences and penalties

[340] Even if it is that the focus ought solely to have been on the issue of imprisonment arising from a sentence imposed under the Regime, deprivation of liberty by that means would still be subject to the requirement to be based on reasonable grounds and procedural fairness (section 14(1)(b)). The Full Court ought to have considered this criterion, in determining whether there was an engagement of the liberty rights of regulated attorneys-at-law in contravention of the Charter.

[341] The Full Court found that the disclosure, reporting and record-keeping obligations of regulated attorneys-at-law under the Regime do interfere with their duty of confidentiality to their clients, resulting in an infringement of their protected rights to privacy under section 13(3)(j)(ii) and (iii) of the Charter. It also concluded that restraining regulated attorneys-at-law from communicating frankly with their clients, as

is the case under the tipping off provisions, amounts to a breach of the right to private and family life and right to protection of privacy of communication enshrined under section 3(3)(j)(ii).

[342] The Full Court concluded that there is also a breach of the privacy rights of regulated attorneys-at-law by the requirement for them to file the Annual Declaration of Activities, which obliges them to disclose confidential information that they may wish to keep private.

[343] Based on the foregoing findings, the Full Court held that the Regime had infringed the privacy rights of regulated attorneys-at-law and their clients and the state was required to bring justification to discharge its burden of proof under section 13(2).

[344] It is observed that concerning these same matters, which the Full Court found to have amounted to an infringement of the privacy rights of regulated attorneys-at-law that warranted justification from the state, the regulated attorneys-at-law stand to be penalised by criminal sanctions and to be deprived of their liberty. The threat of imprisonment or other forms of restraint on their liberty looms large.

[345] By way of illustration, regulation 6(2) of the Regulations sets out the penalties that are attendant on the failure of regulated attorneys-at-law to maintain record-keeping, identification and transaction verification procedures. It can be seen from those penal provisions that regulated attorneys-at-law are at risk of imprisonment for up to 20 years for non-compliance.

[346] In addition to the Regulations, the POCA itself prescribes criminal sanctions in the form of imprisonment for a term not exceeding 10 years for any breaches of sections 94, 95 and 97, which relate to suspicious transaction reporting and tipping off. Similarly, the failure of regulated attorneys-at-law to comply with any requirement issued to them by the GLC and to follow its directives, also amount to a criminal offence as provided for by section 91A(5) with a fine not exceeding $250,000.00 if summarily convicted or $1,000,000.00 if indicted before the Circuit Court.

[347] The sanction of the imposition of only a fine for some offences still leaves regulated attorneys-at-law open to the risk of restraint on or deprivation of their liberty. This risk arises because until the fines are paid, they will not be free. If the fines are not paid at the prescribed time, then a sentence of imprisonment in default of payment would arise, whether expressly provided for by the particular provision or not (see, for instance, section 195 of the Judicature (Parish Court) Act and section 4 of the Criminal Justice (Reform) Act).

[348] It was based on the offence-creating and penalty provisions that the Full Court correctly found that the liberty rights were imperilled by the Regime. It, however, concluded that the Regime was constitutional.

[349] For reasons already discussed (and others to be addressed), this reasoning by the Full Court is rendered unacceptable on these bases:

i. the unchallenged conclusion that the Regime adversely impacts regulated attorney-at-law/client confidentiality and protected

privacy rights amounting to a breach of the constitutional rights to privacy;

ii. the erroneous conclusion that LPP is adequately protected and not undermined by the Regime; and

iii. the restrictive or narrow approach it employed in its section 13(3)(a) analysis.

[350] Once the appellant had established a prima facie case, as it had done, that the Regime interferes with the privacy rights in a manner which infringes the Charter, then it could not be said that the obligations imposed, the offences created and the sanctions to be imposed for non-compliance, concerning those same matters which violate their constitutional rights, are appropriate and reasonable. Any interference with the rights to liberty that would be occasioned by sanctions in connection with the violated constitutional rights to privacy must be viewed as, prima facie, unreasonable and not in accordance with fair procedures laid down by law.

[351] Given my views concerning the erosion of LPP, due to the absence of sufficiently fair procedures within the statutory framework to protect it, it is difficult to accept that engaging the liberty of regulated attorneys-at-law within such a context could be appropriate, reasonable and fair. The infringement of the predicate rights must first be justified in order for the liberty rights connected to, or associated with them, to be justified. Therefore, the interference by the Regime with the liberty rights of regulated attorneys-at-law would be unconstitutional, unless justified in accordance with section

13(2) of the Charter. The justification for the engagement of the liberty rights would be inextricably connected to the justification for the breach of privacy rights.

[352] The Full Court did not take that approach in its analysis. It arrived at a conclusion, regarding the liberty rights, before consideration of whether there was justification for the breach of the privacy rights.

[353] My analysis and conclusion on the perilous engagement of the liberty rights under section 13(3)(a) by the Regime are brought in alignment with the views of the minority (per McLachlin CJ and Moldaver J) in **Canada v FLSC**. The minority view is, essentially, that the challenge to the Canadian Regime was rightly based on its interference with the attorneys-at-law's duty of confidentiality - lawyer/client privilege - which is a constitutional norm, and not as a result of offending the lawyers' commitment to their clients' cause, which "lacks sufficient certainty to constitute a principle of fundamental justice".

[354] I am inclined to the view (borrowing the words of the minority) that the issue concerning section 13(3)(a) "would be better resolved", by relying not only on the principle of LPP, but more so on the constitutionally protected rights to privacy of communication and privacy in one's private life. The protection afforded to the attorney-at-law/client relationship involves but is not limited to LPP, as the Full Court itself recognised.

[355] Once the obligations imposed on attorneys-at-law were found not to have been appropriate, as being in violation of their rights to respect for privacy guaranteed them

by the Charter, as the Full Court found, then it follows that creating criminal offences and penalising them for failure to carry out those inappropriate obligations would be equally unfair and unreasonable.

(d) Whether there is no infringement of the constitutional entitlement to liberty

[356] In my view, breach of the highly critical constitutional right to privacy (even with minimal impairment of LPP, as found by the Full Court) is, by itself, sufficient to establish that the potential deprivation of liberty, whether through imprisonment or other forms of restraint, would violate section 13(3)(a) of the Charter. This would be so because in effect, the regulated attorneys-at-law would, prima facie, be likely to be deprived of their liberty for the wrong done to them by the state. Unless, the breach of privacy is justified, this deprivation of liberty or the risk of it, in connection with those infringed privacy rights, would not be reasonable and in accordance with fair procedures laid down by law.

[357] The Full Court recognised in paragraph [286] that "[i]f the relevant sections are held to be unconstitutional then it follows that the threat of imprisonment under those provisions would be unconstitutional". Therefore, it was premature for it to have concluded, before examining the justification of the breach of the privacy rights in relation to those impugned provisions, that the threat of imprisonment relating to them was constitutional. The requirement for justification for breach of privacy guaranteed by section 13(3)(j)(ii) and (iii) would automatically carry with it a requirement for

justification for breach of liberty because they were grounded on the same factual and legal foundation.

Conclusion on issue (v) as it relates to the liberty rights of regulated attorneys-at-law

[358] I would conclude on the issue concerning the rights to liberty and security of the person that the Full Court failed to take into account some relevant considerations and took into account irrelevant considerations, in holding that there is no limitation on or potential infringement of the regulated attorneys-at-law's liberty rights, which would require justification from the state.

[359] I would hold that the right to liberty of regulated attorneys-at-law, and the right not to be deprived of their liberty, two distinct rights guaranteed by section 13(3)(a), are imperilled and limited by the Regime in the same way as the rights to privacy, protected by section 13(3)(j)(ii) and (iii). The appellant would have established a prima facie case of the potential contravention of sections 13(3)(a) and 14 of the Charter, in the wake of the breach of section 13(3)(j)(ii) and (iii).

[360] For the Regime to be held to be constitutional, then, the likely breach of the liberty rights of the regulated attorneys-at-law must be demonstrably justified in a free and democratic society. The justification is not to be found in section 13(3)(a), standing on its own. The burden is on the state to justify the limitation on, or the interference with, the liberty rights of the regulated attorneys-at-law, in accordance with section 13(2) of the Charter. Whether or not it has done so should have been left by the Full Court to be examined in the final stage of the analysis regarding constitutionality, in

keeping with the approach in **R v Oakes**, which it said it had adopted. By limiting the requirement for justification only in relation to the infringed privacy rights and for not requiring justification for the potential interference of the liberty rights, the Full Court fell in error.

[361] Despite the rejection of some aspects of the appellant's contention on the issue of the liberty rights of regulated attorneys-at-law, it nevertheless succeeds in most aspects of its challenge to the Full Court's findings on the issue of whether there is an infringement or likely infringement of the liberty rights.

Conclusion as it relates to the liberty rights of clients

[362] The Full Court reasoned in relation to the clients that, although the Regime engages their liberty interests, it does not infringe it in a manner that is unconstitutional. This conclusion is based on its reasoning that any proceeding against a client, which leads to deprivation of liberty, would be in accordance with the exception provided by section 13(3)(a).

[363] Again, the Full Court has limited the risk of deprivation of liberty only to imprisonment in the execution of a sentence following conviction, which, as already shown in relation to regulated attorneys-at-law, would not be accurate. The disclosure requirements concerning suspicious transactions, for example, could engage the liberty interests of the clients and could lead to restraint on, or deprivation of their liberty, before a conviction. The section 13(3)(a) qualifier, invoked by the Full Court, does not offer an answer to the challenge posed concerning the clients' interest.

[364] Despite what is viewed as an error in the Full Court's approach and analysis as already discussed, I am not prepared at this time to delve into the issue relating to the clients' liberty interests in greater detail, having concluded on the constitutional right to liberty of regulated attorneys-at-law. The constitutionality of the Regime, as it relates to regulated attorneys-at-law, is the pivotal issue which falls for the determination of the court and it has been decided in favour of the appellant. It is not necessary to proceed further on this issue.

Issue (vi)

Whether the Full Court erred in finding that the examination conducted by the GLC does not amount to "warrantless searches" in breach of the attorney-at-law's constitutional right to protection from search of the person and property (grounds (o), (q), (v) and (w))

[365] The appellant has further complained that the constitutional right of regulated attorneys-at-law to protection from search has been breached by the Regime, through the powers given to the GLC under section 91A(2) of the POCA. The appellant's contention is that section 91A(2)(c) confers on the GLC the power to enter and search the offices of regulated attorneys-at-law, without a warrant, in breach of section 13(3)(j)(i) of the Charter. It further contended that the section also authorises the GLC to act as a state agent in the course of such unlawful search, to examine and take copies of information or documents which could be shared with other agencies, without any adequate measures to protect information and documents to which LPP is attached, in breach of section 13(3)(j)(ii) and (iii) of the Charter.

[366] The powers of the GLC under section 91A(2) includes the right to examine and take copies of information and documents in the possession or control of regulated attorneys-at-law, and relating to their business operations. The section also empowers the GLC to share with specified state agents of Jamaica and analogous agents of foreign states any relevant information and documents it obtained during the examination processes.

[367] Neither the POCA nor the Regulations have prescribed the systems and procedures for the execution of the examination powers of the GLC under this section. Neither have they specified in useful detail the type of information that may be taken and shared with third party state agents. The legislature has left it to the GLC, as the competent authority, to "establish such measures as it thinks fit, including carrying out, or directing a third party to carry out" those examinations to ensure compliance with the POCA and the Regulations (see section 91A(2)(a) of the POCA).

[368] It is, therefore, in the GLC Guidance that the prescribed procedures for the examination of the business operations of regulated attorneys-at-law are to be found. In Chapter 10 of the Guidance, the GLC sets out the matters pertinent to the execution of its monitoring powers. It offers guidance on the types of examinations to be conducted and its powers in relation to them.

[369] The GLC Guidance states that the examinations are not intended to be an audit of the practice of regulated attorneys-at-law but instead, a procedure by which the GLC

tests the adequacy of the programmes, policies, procedures, controls and systems which are implemented to ensure compliance with the Regime.

[370] Paragraph 48 of the GLC Guidance sets out the four examinations that may be conducted and shows on what matters the focus will be. It also indicates that the examinations will be carried out by the GLC or its agents, including accountants.

[371] The GLC Guidance provides for the giving of reasonable notice to the regulated attorneys-at-law before the examinations. The GLC states that the giving of notice means that the examinations are conducted only with the permission of the regulated attorneys-at-law. The system, according to the GLC, requires the cooperation of regulated attorneys-at-law, which is relied on by it.

The relevant findings of the Full Court on the issue

[372] The Full Court accepted that there was a breach of section 13(3)(j)(ii) and (iii) of the Charter, as a result of the powers given by the Regime to the GLC to examine, take and share information under section 91A(2). It did not find, however, that there is any limitation by the Regime on the right to protection from search, guaranteed under section 13(3(j)(i), as a result of the exercise of those same powers. In finding that there was no search expressly authorised by the POCA, the Full Court reasoned in part, in paragraph [186] of the judgment, that because the section under consideration uses the words "examine" and "take copies", the POCA does not provide for search of the businesses operations of regulated attorneys-at-law by the GLC.

[373] It also found that the GLC Guidance does not provide for search of the businesses operations of regulated attorneys-at-law because it too uses the words "examine" and "take copies".

[374] The Full Court went on to conclude at paragraph [187] that there is also no implied statutory power of search granted to the GLC. It opined that to hold otherwise would be to put the construction of the statute in conflict with the Constitution. It stated that it would be contrary to the principle of legality and statutory interpretation. In applying what it set out as the principle of legality, the Full Court concluded that there is a presumption that the GLC, in exercising its statutory mandate, will act in a manner which accords with, rather than derogates from, the fundamental rights enshrined in the Constitution. The Full Court stated that it is also to be presumed that adherence to the principle of legality was the intention of Parliament when it granted powers to competent authorities. It then concluded on this point at paragraph [188] of the judgment:

> "[188] There is therefore nothing expressed or implied in POCA or the Guidance that can be interpreted as the [GLC] being empowered to 'search and seize'. POCA has not given the [GLC] coercive powers, neither has it taken these unto itself. In the event that the [GLC] is of the view that an attorney is not compliant, it will consider whether to take disciplinary action or make a report to the relevant authority. Therein lies its power."

[375] The Full Court further opined that the examinations to be conducted by the GLC, and its power to take documents or other information from the business operations of regulated attorneys-at-law, do not constitute a "search" or "seizure" because regulated

attorneys-at-law are notified in advance of the inspection to be conducted and the GLC can only visit the business of a regulated attorney-at-law with his permission.

[376] The Full Court, in coming to its findings that there was no search and seizure power conferred on the GLC by the POCA, relied heavily on what it saw as similarities between the GLC's functions under the Regime and those of the law societies in Canada (the equivalent of the GLC) in relation to the monitoring of lawyers for compliance with money laundering provisions of the Canadian Regime. It found that the GLC's inspection process bore similarities to the inspections conducted by the Canadian law societies that were accepted as appropriate by the Supreme Court of Canada in **Canada v FLSC**. It formed the view that the power to inspect was conferred on the GLC as the regulatory body for the legal profession to monitor compliance with the Regime and not as a state agency such as the FID or FINTRAC.

[377] It specifically noted that in Canada, there was no contention that the law societies' access and inspections were "warrantless searches" and no issue was taken alleging that their access to documents amounted to breach of privilege and or confidentiality. It opined that "[t]he fact that the Law Societies were the regulatory/supervisory bodies appeared to have, quite naturally, given them implicit authority". The Full Court concluded that that the purpose of the GLC's inspections would be to monitor compliance and not to obtain information that might indicate or provide evidence regarding persons suspected of money laundering. This is unlike the purposes of the FINTRAC search in the Canadian model, it noted.

[378] On the basis that the examinations would be conducted by the GLC, as the regulatory body for attorneys-at-law, which in its view, provide protection for LPP, the Full Court concluded that search and seizure are not permitted by the POCA, and so, there is no likely infringement of the right to protection from search.

Analysis and findings

[379] It is difficult to accept the reasoning and conclusion of the Full Court that the Regime does not engage, at least, the right to protection from search of property secured by section 13(3)(j)(i) of the Charter, in a manner which would call for justification from the state.

[380] The right of everyone to protection from search of their person and property is one aspect of the right to respect and protection of privacy, in general, which is guaranteed by section 13(3)(j) of the Charter. It is the privacy to which a person is entitled, broadly, that gives rise to the right to be protected from search of his person and property. The right not to be searched is, therefore, inextricably woven into the right to privacy in one's private life, home life and communication. In speaking of section 21 of the New Zealand Bill of Rights Act, which secures the right to be free from search, Elias CJ described the right, simply, but quite effectively, as "the right to be let alone" (see **Omar Hamed and another v R** [2011] NZSC 101).

[381] In speaking of the rights under section 13(3)(j)(ii) and (iii), the Full Court captured the essence of section 13(3)(j), in general, when it opined at paragraph [254] of the judgment:

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

[382] The Full Court was content, it seems, to rest its conclusion that the right to protection from search had not been engaged, partly on the presumption of legality, and, partly, on statutory interpretation. Having applied that approach, it arrived at the conclusion it did that search and seizure are not authorised by the Regime because of the words "examine" and "take" that are used in the section and in the GLC Guidance. This reasoning, with all due respect, is demonstrably flawed. I will begin with what is perceived as the error in the approach to statutory interpretation that the Full Court applied.

(a) <u>The meaning of "search" and "seizure"</u>

[383] Section 13(3)(j)(i) of the Charter, which the appellant is alleging is infringed or likely to be infringed by the Regime, uses the word "search" and there is no use of the word "seizure". It is accepted that the POCA does not use the word "search" or "seizure" in speaking to the GLC's powers as the competent authority. Section 91A(2)(a) of the POCA empowers the GLC to carry out or direct a third party to carry out "such inspections or verification checks as it deems necessary". The POCA also states that the GLC (and by extension its agents) may "examine", "take" and "share"

documents or information found in the possession or under the control of regulated attorneys-at-law relating to their business operations.

[384] The Full Court's finding that there is no "search" and "seizure" permitted by the Regime, seemingly, emanated from the somewhat restrictive and special meaning it sought to attribute to those terms. The words ought to have first been given their ordinary and grammatical meaning, which would have been keeping with the literal rule of statutory interpretation. In employing that approach, I have arrived at the finding that there was nothing in the section or the statute, on a whole, to warrant a departure from the ordinary and grammatical meaning of the words.

(i) "search"

[385] The Concise Oxford English Dictionary defines the word "search", when used as a verb, as, as among other things:

> "To try to find something by looking or otherwise seeking carefully and thoroughly; **examine** thoroughly in order to find something..." (Emphasis added)

[386] The New Oxford American Dictionary also defines it as:

> "To try to find something by looking or otherwise seeking carefully and thoroughly; to **examine** (a place, vehicle or person) thoroughly in order to find something or someone." (Emphasis added)

[387] This same dictionary meaning is adopted in other jurisdictions with similar constitutional provisions as the Charter. The learned authors of Words and Phrases Legally Defined, Volume 2, at pages 904-907, noted the meaning ascribed to the word

"search" in jurisdictions like Australia, Canada and New Zealand. In so far as is relevant, some of those meanings are outlined below.

[388] In the Australian context, the word "search" is an "ordinary English word". When used as a verb in relation to a person, it means, according to the Oxford English Dictionary, 2nd edition, 1989, pages 804-805:

> "***To*** **examine** by handling, removal of garments and the like to ascertain whether any article (usually something stolen or contraband) is concealed in his clothing." (Emphasis added)

[389] In relation to property:

> "[It]conveys trying to find something by looking or otherwise seeking carefully and thoroughly (The New Oxford Dictionary of English ((1998) Ed, p 1677)."

[390] Other dictionaries in Australia have ascribed the meaning, "to **examine closely** something or someone" to the word (see The Macquarie Dictionary and the Chambers English Dictionary).

[391] In Canada, the word "search" is, similarly, accepted to be:

> "The action or an act of searching; **examination or scrutiny** for the purpose of finding a person or thing. ... Also, investigation of a question; effort to ascertain something [the Oxford English Dictionary (2nd ed 1989)]." (Emphasis added)

[392] In New Zealand, "a search" is accepted to be, "in broad terms an **examination** of a person or property". **R v Grayson and Taylor** [1997] 1 NZLR 399 at 406, is referenced.

[393] I have taken this detailed approach in my focus on the word "search" to make the point that it is widely accepted that for purposes of the law, "to search" is no different in ordinary meaning and effect from, "to examine" that is used in section 91A(2) of the POCA. To say then, that because the word "examine" is used in the statute and not "search" would be a simplistic approach to the question whether "search" is authorised by the statute.

(ii) "seize"

[394] The same is true in relation to the word "seize". Like in the case of "search", the Charter does not use the word "seize" or "seizure" but it is clear that if there should be no interference with a person's property, then it means that it should not be seized. The POCA, however, authorises the GLC (and by extension its agents) to "take copies of documents or information", which the Full Court found to be unobjectionable because there is no use of the word "seize". This reasoning is proved to be faulty, in the light of the ordinary and literal meaning of the word, which will now be explored.

[395] In the New Oxford American Dictionary, many meanings are ascribed to the word "seize" when used in different contexts. However, the most relevant definition in our context and for our purposes would be:

> "(of the police or another authority) **to take possession of something by warrant or legal right**; confiscate; impound." (Emphasis added)

[396] The learned authors of Words and Phrases Legally Defined, Volume 2, at page 921, again, pointed out that in New Zealand, "seize" within the context of section 21 of

the Bill of Rights Act, is accepted to be the, "**taking of that which is discovered**" upon an examination of a person or property. This meaning attributed to the right to be free from search protected by the Bill of Rights Act, in that jurisdiction, accords fully with the dictionary meaning of "seize", which I accept.

[397] Applying the ordinary grammatical meaning of the words "search" and seizure", it would mean that the taking of information or documents from the businesses of regulated attorneys-at-law, upon an examination conducted in execution of the power conferred on the GLC by the POCA, would amount to a search and seizure. It would mean, without more, that, search and seizure by the GLC are permitted by section 91A(2) of the POCA. If any greater support for this proposition is needed, it is to be found in case law, to which I will now turn.

(iii)Search and seizure in case law

[398] In the Canadian Act, which was under scrutiny in **Canada v FLSC**, neither the word "search" nor "seize" was used in section 62, which authorised the FINTRAC to examine the businesses of attorneys-at-law (and others). The section provided:

> "**To ensure compliance**
>
> 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**." (Emphasis added)

[399] The FINTRAC was authorised to "examine", "reproduce", "copy" and "remove", data of regulated attorneys-at-law for the purpose of ensuring compliance with Part 1.1 of the Canadian Act, in the same way that the GLC is authorised by the POCA to ensure compliance with Part V of the POCA and the regulations issued thereunder. There was no provision for judicial pre-authorization of entry and examination by way of a warrant in respect of premises, which were not a dwelling-house.

[400] For immediate purposes, it is important to note that the absence of the words "search" and "seizure" did not, prevent the Canadian Supreme Court from concluding that section 62 authorised a "warrantless search and seizure", in contravention of section 8 of the Canadian Charter. Just as a reminder, this section guarantees protection from unreasonable search and seizure.

[401] Similarly, in **R v Law** [2002] 1 SCR 227, the Supreme Court of Canada also held that the photocopying of a document by the police amounted to a search and seizure within the context of section 8 of the Canadian Charter.

[402] The dicta of the Supreme Court of Canada in **R v McKinlay Transport Ltd** [1990] 1 SCR 627, cited in submissions by the appellant before this court, also prove very instructive on this issue. In that case, the appellants (taxpayers) were being audited by the revenue authority in respect of payment of income tax. Pursuant to section 231(3) of the Canadian Income Tax Act, the revenue authority served the appellants with letters demanding information and the production of documents relative to their tax returns. The appellants failed to comply with those demands. An information was issued at the instance of the revenue authority, alleging that they had breached the Canadian Income Tax Act. The judge at first instance quashed the information, upon the application of the appellants, holding that section 231(3) violated the protection against unreasonable search and seizure guaranteed by section 8 of the Canadian Charter.

[403] On appeal to the Supreme Court of Canada, it was held (by an overwhelming majority) that there was a "seizure" within the meaning of section 8 of the Canadian Charter by virtue of the letters of demand, but that it was reasonable and, therefore, not in contravention of the Canadian Charter. What is worthy of note, for immediate purposes, is that although there was no direct taking of the information or documents from the appellants from their premises, but only through a letter demanding them, that was, nevertheless, held to be a seizure for the purposes of engaging the Canadian Charter. This case is utilised at this juncture to show that the use of the word "take" in the POCA cannot simply be taken, on the face of it, to say there is no provision for a seizure.

[404] I find that there is enough from the dictionary meaning of the words and the relevant authorities treating with them, to support the view that the fact that the POCA does not use the words "search" and "seizure" but rather "examine" and "take" does not mean that search and seizure are not permitted by the Regime. It is clear that "to search" bears the same meaning or connotation as "to examine" and "to seize" the same as "to take".

[405] The Full Court fell in error to find, that on the basis of statutory interpretation, "search" and "seizure" are not permitted by the Regime, simply, because those terms are not used in the relevant provisions.

(b) <u>The presumption of legality of the GLC's inspection powers</u>

[406] The second aspect of the Full Court's findings, which is cause for concern, is its application of the presumption of legality to the examination powers of the GLC. It had resolved the matter on the premise that it must be presumed that the GLC will act lawfully and that to hold otherwise would have put the construction of the statute in conflict with the Constitution. It does seem that in order to avoid a conflict of the provision with the Constitution, the Full Court resorted to the presumption of constitutionality (rather than mere legality) to bring the provision in line with the Charter, without undergoing a proper examination to see whether, indeed, the provisions are constitutional. There was no need and no proper basis for the Full Court to invoke any presumption as an aid to construction because the words of section 91A of the POCA as well as section 13(3)(j) are clear and unambiguous on the literal meaning of the words used.

[407] Francis Alexis in his text Changing Caribbean Constitutions, 2nd edition, 2015, at page 243, paragraph 9.97, made the interesting point that:

> "The Courts do not rush to see statutory powers as being unfettered. Nor do the Courts proceed on the assumption that statutory powers might be exercised arbitrarily."

[408] He then continued at paragraph 9.100:

> "Precisely, however, because of the settled presumption against the grant of statutory powers as being unfettered, it should be for Parliament to lay down the limits of a power it conveys. Especially where there is a Constitution which is the supreme law, with an entrenched Bill of Rights, it should not be for the Courts to imply guidelines into an Act to lend it constitutionality. And, indeed, at times the UKPC has so held [see **de Freitas v Permanent Secretary** (1998) 53 WIR 131]."

[409] I endorse the view that because of the settled presumption against the grant of statutory powers as being unfettered, it should be for Parliament to prescribe the limits of the power it conveys. This is especially so where, as in this case, it is obvious on the face of it that the powers are bound to engage a Charter right.

[410] The use of the presumption of legality by the Full Court to validate the power conferred on the GLC by the POCA was not appropriate in the context of this case. This is so because at the time it invoked the presumption, it had already found that the same powers of the GLC have infringed the privacy rights of regulated attorneys-at-law, to which the right under section 13(3)(j)(i) is closely related. There was, therefore, a breach already established on the clear meaning of the section, so, any presumption that could arise in favour of Parliament that the Regime was constitutional would have

been rebutted in relation to the rights to privacy. The Full Court would have been mindful at that juncture that there was, on the facts of the case before it, incontrovertible evidence that Parliament has passed the law, which infringes the Charter.

(c) <u>The effect of the giving of prior notice on the right to protection from search</u>

[411] Another aspect of the Full Court's reasoning that is equally unacceptable is that because prior notice is to be given to regulated attorneys-at-law, the examinations are to be done with their permission, and so, there will be no search. As is demonstrated by the detailed review of the definitions of the word "search", in none of them is there any reference to the need for lack of consent or permission for there to be a search. A search may be conducted with the permission of the person whose person or property is to be searched. Consent, therefore, is not to be read into the meaning of the word as used in the Charter to limit the scope of the right.

[412] This conclusion is supported by an examination of the provision relating to the right to be protected from search in the former Bill of Rights, section 19(1). It read:

> "**Except with his own consent,** no person shall be subject to **search** of his person or property or the entry by others on his premises." (Emphasis added)

Section 19(2) then detailed the prescribed limitations on that right which would have rendered a search constitutional, if done without consent.

[413] It is clear that the qualifying phrase, "except without his own consent", was placed in section 19(1) of the former Chapter III to qualify the right that no person should be searched. This alone imports the notion that consent is not a part of the meaning of the word because had it been so, there would have been no need to speak separately to the issue of consent. Furthermore, the fact that the framers, upon amending the Chapter, had omitted that modifier means that consent, or lack of it, is not intended to be a part of the scope and content of the right. The framers of the Charter obviously intended to expand the ambit of the right by deliberately omitting the words, "except with his own consent". Therefore, there was no basis for the Full Court to have implied a requirement for absence of consent to be part of the meaning of the word "search".

[414] Quite apart from the meaning of the word "search" in the context of the Charter, however, there is another reason that renders the arguments of the respondents and the findings of the Full Court unacceptable as it relates to the giving of prior notice and that examination would be by consent.

[415] The giving of prior notice of the GLC's intention to attend on the businesses of regulated attorneys-at-law to conduct its examinations does not equate to a request for their permission. This is so because there is, and can be, no legitimate or genuine right of regulated attorneys-at-law to refuse to have their business operations examined by the GLC. There are criminal and disciplinary sanctions that can flow from refusal to

allow an examination or generally, to follow the directives of the GLC. This has been explored in treating with the liberty interests.

[416] The fact that the power of the GLC is backed by criminal sanctions (in conjunction with, and as distinct from, internal disciplinary sanctions), demonstrates that it could not be the intention of Parliament that the consent of regulated attorneys-at-law must first be obtained as a precondition for the exercise of the GLC's powers of examination and monitoring. The provisions which confer the power on the GLC as well as those which provide the sanctions for non-compliance with the GLC's directives, strongly militate against any inference that the powers of the GLC to examine and take documents or information is dependent on the consent of the regulated attorneys-at-law.

[417] If regulated attorneys-at-law were free to elect whether or not to obey the GLC and comply with the Regime, then the objectives of the Regime would not be realised. I am sure that Parliament did not intend that attorneys-at-law should have the option to decide whether to be regulated or not; hence the provision for criminal and disciplinary sanctions. I would reiterate within this context, that the GLC's reliance on the permission of regulated attorneys-at-law would run counter to the legislative intent and the ethos of the Regime.

[418] It means, as already established, that regulated attorneys-at-law can only refuse to have their business operations examined at their peril or on pain of punishment. In **R v Big M Drug Mart Ltd** [1985] 1 SCR 295 at page 336, the Supreme Court of Canada

stated that if a person is compelled by the state or the will of another to a course of action or inaction which he would not have otherwise chosen, he is not acting of his own volition and he cannot be said to be truly free.

[419] I find, in agreement with the appellant, that the Full Court erred in finding that the right to protection from search is not engaged or infringed because prior notice will first be given to regulated attorneys-at-law and the examinations are only to be done with their permission.

[420] It is also noted that the Full Court, in concluding that there is no power of search and seizure, reasoned that the GLC has no coercive powers. This too, I have found difficult to accept. I will simply say that the possession of coercive power by the GLC is not needed for there to be a search and seizure. In any event, if it were needed, it cannot be said that the GLC does not possess coercive powers. The GLC has the power to withold practicising certificates, initiate criminal proceedings and impose disciplinary sanctions for the failure of attorneys-at-law to follow its directives and cooperate with the process. This power begins from the point that attorneys-at-law are required to file the declaration of activities so that the determination can be made by the GLC whether they are to be regulated.

[421] Dicta from the Supreme Court of Canada in **R v Big M Drug Mart Ltd**, has, once again, proved instructive in treating with this question of whether the GLC possesses coercive powers. The court opined that coercion "includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of

sanction" but also, "indirect forms of control which determine or limit alternative courses of conduct available to others" (see page 337 of the report). I endorse this view. The Full Court was, therefore, not correct to say that there can be no search because the GLC has no coercive power.

[422] To take the analysis even further, it should be noted that in the Charter, the word "reasonable" is omitted as an internal modifier of the word "search". In fact, the section does not bear the expressed qualifiers as the right to liberty does. It means then, that the right to be protected from search is a very broad one; broader, it seems, than the right guaranteed by section 8 of the Canadian Charter, the Fourth Amendment of the United States of America, and section 21 of the New Zealand Bill of Rights Act. In those instruments, it is expressly stated that persons are protected from "unreasonable" searches of their person and property. Those constitutional instruments, therefore, expressly narrowed or demarcated the ambit of the right by the use of a specific qualifier, unlike the Charter. So too, the former provision under Chapter III also had explicitly set out the specific qualifiers limiting that right which included proof by the person challenging the law or action that it was unreasonable or not reasonably required. Those specific qualifiers are omitted from the Charter. The right is now only subject to the general qualifier under section 13(2) of the Charter.

[423] It follows then that in the absence of the specific qualifier of "unreasonableness" or any other internal qualifier in section 13(3)(j) of the Charter, the general rule, and default position, is that no one in Jamaica is to be subjected to search of their person or

property by the state or any other person; whether exercising coercive power or not. Therefore, a person alleging breach or potential breach of this constituional right against the state or any other person is not required by the Charter to prove that the search involved the exercise of coercive powers. Once a search is proved, in fact, then, the burden on the individual to prove the infringement or likely infringement is discharged. The burden of proof then shifts to the violator to satisfy the justificatory criterion in section 13(2) of the Charter, that is to say, the search is demonstrably justified in a free and democratic society. Within that context, the question of the reasonableness of the search and other matters, such as consent, would fall to be considered.

[424] The same reasoning applies to the right to protection from seizure of property, although that would fall within section 13(3)(j)(i) and (ii) as interference with the privacy rights guaranteed by those subsections.

(d) Whether the appellant has established an infringement of the right to protection from search and seizure

[425] Once the appellant has established that section 91A of the POCA authorises search of the businesses operations of regulated attorneys-at-law, in contravention of section 13(3)(j)(i) (and by extension the other privacy rights in respect of seizure), then it would need to do nothing more because the burden cast on it would have been discharged. The burden of proof would be on the state to establish the constitutionality of the search (and seizure) by saving it under section 13(2).

[426] On this analysis, it would mean that the Full Court would have erred in not finding a breach of section 13(3)(j)(i) and not calling upon the state to demonstrably justify section 91A of the POCA. This is simply on the basis that, by allowing the GLC to examine and take information and documents, which it is at liberty to share with third parties, including agents of the state, it has destroyed the right to protection from search of their property and interference with their privacy afforded them by section 13(3)(j). All the rights secured under section 13(3)(j) would have been engaged and imperilled by the Charter.

[427] If I am wrong in the above conclusion, there are other aspects of the Full Court's reasoning that would still render its decision erroneous, in fact and law, upon an alternative analysis. This alternative analysis is based on the assumption that the word "unreasonable" is to be implied into the Charter to qualify the word "search". The introduction of this implied internal qualifier of "unreasonable" would bring our provision on all fours with those of Canada, the United States of America and New Zealand. So, on this alternative analysis, the appellant would be required to establish that the POCA authorises unreasonable search of the business operations of regulated attorneys-at-law by the powers given to the GLC, in breach of the Charter.

(i) Are warrantless searches permitted by the POCA?

[428] A part of the appellant's challenge to the Regime is that it authorises warrantless searches. The question is, if that is so, does that render the search unreasonable? Once it is accepted that section 91A(2) authorises search by the GLC, then it follows logically, on a reading of the section, that it authorises "warrantless" searches. It is simple: there

cannot effectively be an examination of the business operations of regulated attorneys-at-law, without access or entry to the physical space in which the operations are conducted as well as access to their data. There can also be no inspection of the information in their possession or under their control without direct access, whether by a demand for off-site production or by visiting their operations directly. It is clear that the GLC recognises this, hence the provision for notice to be given to the affected attorneys-at-law before the attendance of the GLC. There are provisions in the POCA for search and seizure warrants to be obtained from a judge in certain specified circumstances connected to the enforcement of the Act (see, for instance, sections 115 and 118). There is no express provision in the POCA in respect of the need for a warrant with regards to entry to the premises and for examination to be conducted by the GLC. The GLC Guidance also makes no such provision. There is, therefore, no statutory authority given to a judge to issue warrants to the GLC for the purposes of the POCA.

[429] When one compares the provisions of the POCA with those of section 62 of the Canadian Act that was under consideration in **Canada v FLSC**, it is evident that the Canadian Parliament had seen it fit to make express provision for entry to the businesses of the attorneys-at-law. It made sure to specify that there shall be no entry to the dwelling places of attorneys-at-law for the purposes of ensuring compliance with the Canadian Act, without prior judicial authorization. The POCA has not gone so far to offer protection to regulated attorneys-at-law in relation to the GLC examinations, in the

event matters relating to their business operations are on the same premises as their dwelling house.

[430] It is, therefore, left up to the GLC to determine how entry and access will be gained to the business operations of regulated attorneys-at-law, wherever they may be. Given that there is no provision for judicially-authorised entry by warrant, any entry or access to the businesses of regulated attorneys-at-law, for the purposes of the inspection by the GLC, must, indeed, be warrantless. It is for this reason, undoubtedly, that in an effort to minimise this gap in the legislation, that the GLC has devised a scheme based on prior notice and consent. The fact though is that whether entry is consensual or non-consensual, the Regime is based on warrantless entry and access to the business operations and information of regulated attorneys-at-law.

[431] Warrantless entry and inspection by the GLC is, however, not objectionable, in and of itself. Neither is it determinative of the issue of whether search is authorised by the POCA, and, if so, whether it is unreasonable or otherwise in contravention of the Charter. Constitutionality of the power is dependent on other considerations, such as, where the search is conducted, what is searched, the expectation of privacy of the individual who is subject to the search in relation to the subject matter of the search, and the purpose for which the search is conducted. These material considerations will now be examined.

(ii) Reasonable expectation of privacy

[432] Based on the authorities, which treat with Charter provisions in which the element of unreasonableness is a requirement to be proved in an allegation of breach of the right to be protected from search, a pertinent consideration is, usually, the aggrieved person's reasonable expectation of privacy in the subject matter of the search.

[433] The Full Court's finding that the privacy rights under section 13(3)(j)(ii) and (iii) are breached is in keeping with the Strasbourg jurisprudence emanating from the ECtHR's treatment of Article 8 of the Convention, to which the Full Court also had regard. Article 8 provides that everyone has the right to respect for his private and family life, his home and his correspondence and that there should be no interference with the exercise of this right except in the circumstances enumerated in paragraph 2 of the Article.

[434] This Article does not use the word "search" as the Charter does neither does it use the word "seizure". Still, it does guarantee that right to protection from search and seizure by the use of the words, "[t]here shall be no interference" with a person's privacy in the matters enumerated at paragraph (1) of the Article. This interference would include by search or seizure. Therefore, the omission of the words "search" and "seizure" does not mean search of the person or property is excluded from the guaranteed privacy rights under Article 8. Accordingly, the right to be free from search under the Charter is but another way of saying that there shall be no interference with an individual's privacy in the spheres of his life protected by section 13(3)(j).

[435] Article 8, in effect, is the same as our section 13(3)(j), in general, except that it has its specified or internal qualifier. The absence of a similarly worded qualifier from our section 13(3)(j), does not mean that the right is absolute. It can be properly limited if it is demonstrably justified in a free and democratic society to do so. Such justification would include the matters referenced in the Article 8 qualifier, which are indisputably necessary, in a free and democratic society.

[436] Substantial aspects of the case law emanating from the ECtHR, in treating with Article 8 is captured by the Guide on Article 8 of the European Convention on Human Rights - right to respect for private and family life, home and correspondence, European Court of Human Rights ("the Guide to Article 8"). The Guide to Article 8 establishes that the Article imposes on states "a positive obligation to secure to their citizens the right to effective respect for their physical and psychological integrity". It covers, among other things, personal information, which individuals can legitimately expect should not be published without their consent (see, **Axel Springer AG v Germany** application no 39954/08 [2012] ECHR 227).

[437] The Guide to Article 8 also states that the ECtHR, in order to ascertain the scope and bounds of the right to privacy, has, on several occasions, examined whether individuals had a reasonable expectation that their privacy would be respected and protected. This "reasonable expectation of privacy test" has developed as an important analytical tool in Strasbourg jurisprudence in the court's treatment of privacy rights

under Article 8, which would include the right of an individual to be free from search of his person and property. It is noted, however, that the test is said not to be conclusive.

[438] An excellent example of the application of the reasonable expectation of privacy test to the right to be protected from search is also seen in The Fourth Amendment jurisprudence of the USA. The Fourth Amendment guarantees:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[439] The test in the United States of America originated from the dictum of Justice Harlan in **Katz v United States** 389 US 347 (1967). In that case, the petitioner was convicted under an indictment charging him with transmitting wagering information by telephone across state lines in violation of Title 18 of the United States Code section 1084. Evidence of the petitioner's end of the conversations that was overheard by FBI agents who had attached an electronic listening and recording device to the outside of the telephone booth from which the calls were made, was introduced at the trial. The Court of Appeals affirmed the conviction, finding that there was no Fourth Amendment violation since there was "no physical entrance into the area occupied by" the petitioner.

[440] On appeal to the US Supreme Court, it was held, among other things, that the government's eavesdropping activities violated the privacy upon which the petitioner justifiably relied, while using the telephone booth and thus constituted a "search and

seizure" within the meaning of the Fourth Amendment. It was further held that it was of no constitutional significance that the electronic device, employed by the FBI to listen in on the conversation, did not penetrate the wall of the telephone booth.

[441] It was established by Justice Harlan on such analysis and based on prior decisions that the rule is that there is a twofold requirement to the question of whether a person has a reasonable expectation of privacy. The first is that that the person has exhibited an actual (subjective) expectation of privacy, and the second, that the expectation is one that society is prepared to recognise as reasonable.

[442] Similarly, in Canada, the concept "search" was given broad connotation in several cases for the purposes of their Charter provision, with attention being devoted to the question of reasonable expectation of privacy. In **R v Law**, the Supreme Court of Canada held that police conduct that interferes with the reasonable expectation of privacy of an individual constituted an unreasonable search within the meaning of section 8 of the Canadian Charter. Also, in **Lavallee**, it was held that:

> "A client has a reasonable expectation of privacy in all documents in the possession of his or her lawyer, which constitute information that the lawyer is ethically required to keep confidential, and an expectation of privacy of the highest order when such documents are protected by the solicitor-client privilege."

[443] In **R v McKinlay Transport Ltd**, the court, in finding that there was a seizure within section 8 of the Canadian Charter, found that it was reasonable, by having regard to the expectation of privacy of the appellants (taxpayers). The court decided that a taxpayer's expectation of privacy, with regards to the documents in question, vis-

à-vis the Minister of National Revenue, was relatively low. This finding of a low expectation of privacy was partly (and significantly, for our purposes) due to the fact that the taxpayer's privacy interest "[was] protected as much as possible" by section 241 of the Canadian Income Tax Act. This provision forbade the disclosure of the taxpayer's records or the information contained therein to other persons or agencies. The disclosure was one to the Minister of National Revenue who needed the information to carry out his functions.

[444] Also, in New Zealand, Elias CJ stated in **Hamed v R**, that police investigation which invades private space where individuals have an expectation of privacy, constitutes a search.

[445] The reasonable expectation of privacy test is, therefore, widely accepted as a standard consideration or analytical tool in treating with the right of an individual to be protected from search as guaranteed by a constitutional instrument.

[446] It cannot be said that the Full Court was not mindful of the need to consider the expectation of privacy of regulated attorneys-at-law or their clients. It gave recognition to that consideration in treating with the other privacy rights under section 13(3)(j). It opined (quite pertinently, in my view) at paragraph [251] of the judgment:

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

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

[447] The observation of the Full Court in respect of the "understandably and legitimately high expectation" of privacy between attorneys-at-law and their clients in relation to section 13(3)(j)(ii) and (iii), privacy rights should have applied with equal force to its section 13(3)(j)(i) analysis. It, however, failed to have regard to that consideration because it, erroneously, took the view that there is no search power under the Regime. This was an error of fact and law.

[448] The GLC has, apparently, recognised this omission and, so, has addressed the issue in appreciable detail in its submissions before this court. The 1st respondent has adopted those submissions.

[449] The GLC and the 1st respondent did not file a counter-notice of appeal for the decision on this issue to be affirmed on other grounds not relied on by the Full Court. However, given that this is a constitutional claim coupled with the fact that the issue had been raised in written submissions exchanged between the parties, I see no reason to ignore it in determining whether the right to freedom from search has been engaged. It ought to have been considered by the Full Court.

[450] Mr Wood submitted that the documents and information that the GLC will seek to examine are not matters in relation to which there would be a reasonable expectation of privacy on the part of regulated attorneys-at-law and their clients. He insisted that there will be no wide-ranging examination of the business operations of regulated attorneys-at-law, with the GLC "rifling" through client files. Specific focus, he said, will be on procedures, staff training and documentation to substantiate transactions. "The GLC is interested in nothing else", he asserted.

[451] Learned Queen's Counsel further noted, among other things, that some of the procedures under the Regime are already open to scrutiny by the GLC under the the Legal Profession (Accounts and Records) Regulations 1999 ("the Accounting Regulations"). Furthermore, he said, some of the information, which would have to be disclosed, such as in the context of a conveyancing transaction, would have to be disclosed, in any event, to other government departments, such as the Stamp Office and the Office of the Registrar of Titles. He argued that there is no privacy attached to the information which the GLC intends to inspect. No LPP, he said, is connected to client's names and contact details. It is the same types of records that are kept by other institutions in the regulated sector, and there can be no justification to putting a cloak of secrecy to such information in the hands of regulated attorneys-at-law. He drew the attention of the court to several authorities in advancing, quite forcefully, that there is no reasonable expectation of privacy in the matters to be examined by the GLC, and so, there will be no search in contravention of the Charter.

[452] I have considered all the arguments urged by the respondents on this matter along with the authorities relied on them, but find, with all due respect, that I am unable to accept the contention that regulated attorneys-at-law will have no reasonable expectation of privacy in what is to be examined and taken by the GLC under the Regime.

[453] The first point of departure is that the mere fact that the information or document is within the context of an attorney-at-law/client relationship, means that it falls within a, historically, legally protected zone. This relationship enjoys certain privileges as to confidentiality and privacy in communication, which is absent from a person's interaction with other DFNIs. This is recognised by the POCA, which makes it clear that information subject to LPP must be protected. It follows from this that the fact that certain information are disclosable within the context of interaction by persons with other DFNIs does not mean it is the same within the attorney-at-law/client relationship.

[454] In **Attorney General of Canada and Canada Revenue Agency v Chambre des notaires du Quėbec and Barreau du Quėbec** [2016] 1 SCR 336 (in which section 8 of the Canadian Charter was in issue) the Supreme Court of Canada made some useful comments, which prove quite instructive in the analysis of section 13(3)(j)(i) of the Charter. By reference to several decided cases, the court opined in these terms, as summarised and slightly modify by reference to "attorney(s)-at-law" rather than "lawyer(s)":

i. It is important for a client consulting a legal adviser to feel confident that there is little danger that information or documents shared by him will be disclosed in the future, regardless of whether the consultation takes place in the context of **administrative**, penal or criminal investigations (for emphasis).

ii. The attorney-at-law's obligation of confidentiality is necessary to preserve the fundamental relationship of trust between them and their clients. From this perspective, it is not appropriate to establish a strict demarcation between communications that are protected by professional secrecy and facts that are not so protected. The line between facts and communications may be difficult to draw.

iii. The court has found that certain facts, if disclosed, can speak volumes about a communication. **This is why there must be a rebuttable presumption to the effect that all communications between a client and their attorney-at-law and the information they share, would be considered, prima facie, confidential in nature** (for emphasis).

[455] Given the unique position of attorneys-at-law in a free and democratic society, and the resultant legal privileges attached to the attorney-at-law/client relationship, which is not shared by other professionals with their clients, it must be presumed as a starting point, that all communications between a client with a regulated attorney-at-law are, prima facie, confidential in nature and ought not to be disclosed to third parties without the client's knowledge and consent.

[456] The Regulation requires as part of the identification procedures, customer information as to, among other things, full name, current address, taxpayer registration number and place of birth. For verification of identification, the Regulation provides that evidence such as recent bills from a utility provider should be produced. The GLC Guidance requires photo identification such as passport, driver's licence or voter identification card. Authorities have shown that depending on the context, these could contain privileged information or constitute matters in which the client may have a reasonable expectation of privacy and desires to keep confidential.

[457] The ambit of the GLC's powers under section 91A(2) is cast very wide. Quite apart from documents and information expressly specified in the Regulations and the GLC Guidance as being liable to disclosure and examination, there are other unspecified documents or information that could fall within the GLC's powers of inspection. There is, for instance, information that may be required from a regulated attorney-at-law to substantiate or verify a transaction, such as the amount and source of income.

[458] The court, at this stage, is not considering the issue with actual information or documents to be examined and with the advantage of hindsight. Therefore, it cannot be safely concluded, as the respondents would want the court to do that regulated attorneys-at-law or their clients will never have a reasonable expectation of privacy in documents or information to be examined, taken and shared by the GLC.

[459] Within this context, I will highlight that although the GLC has tried to show the matters that it would have regard to during its inspection, no critical detail is provided about the conduct of special and random examinations, for example. Special examinations are to be conducted, for instance, when the GLC has cause to believe that an attorney-at-law has not been truthful in his annual declaration of activities. For the GLC to satisfy itself of the credibility of the declaration there must be, at least, an investigation into, or a careful examination of, the business operation of the suspected attorney-at-law. Dealing with an attorney-at-law who is believed not to be forthright and cooperative must demand a different strategy for the required information to be obtained. The Regime has not specified the defined boundaries and methodology of such an examination. How then would the GLC ascertain that the attorney-at-law is not being truthful and is to be regulated?

[460] There is nothing shown by the GLC that would satisfy this court that the special examination to be undertaken under such circumstances would not, at any time, interfere with an attorney-at-law's and his clients' reasonable expectation of privacy, or indeed, LPP. Even if the attorney-at-law allowed the examination upon prior notice

having been given, that would not take away from his reasonable expectation of privacy in his business operation, which partially arises from the inviolability of his business premises, to which access would have to be gained for the special examination to be conducted. This would be of even greater importance in relation to an attorney-at-law who is found to have been truthful and, therefore, not to be regulated for the pruposes of the Regime.

[461] While documents and information subject to LPP are to be protected under the Regime, there are other non-privileged matters, which, in any event, would be confidential and which the regulated attorney-at-law or his clients may not be desirous of sharing with third parties, including the GLC and its agents. They would have a reasonable expectation of privacy in such documents or information. The Full Court had found that to be so, in treating with the rights guaranteed by section 13(3)(j)(ii) and (iii). This is made abundantly clear at paragraphs [251] and [254] of its judgment.

[462] The combined reasoning of the Full Court in those two paragraphs is an attestation to its recognition that even, outside of privileged information, regulated attorneys-at-law have a reasonable expectation to maintain the confidentiality of client information and their communication with them. The duty of confidentiality is a badge for the legal profession more than any other professional group.

[463] The question for the determination of the Full Court was whether the POCA authorises search, in conflict with the Charter, as alleged, and not necessarily, whether the GLC intends to act in a manner contrary to the Constitution. If the provisions of the

POCA itself conflict with the Constitution, then that is where the problem lies because section 2 of the Constitution is clear and non-negotiable. The court must ensure that no law passed by Parliament is inconsistent with the Constitution. The court must look broadly at what Parliament has statutorily empowered the GLC to do, to see whether there is any conflict or potential conflict with the Charter in the ways alleged by the appellant.

[464] The actual wording of the POCA must be the starting point, while having regard to the need for a broad and purposive approach to give effect to the fundamental rights and freedoms that the Constitution guarantees. In the Canadian case of **R v Colarusso** [1994] 1 SCR 20, La Forest J stated, quite helpfully, that:

> "...[S] 8, like other Charter rights, must be **broadly and liberally construed to effect its purpose. And that purpose ... is to secure the citizen's right to a reasonable expectation of privacy against governmental encroachments. The need for privacy can vary with the nature of the matter sought to be protected, the circumstances in which and the place where state intrusion occurs, and the purposes of the intrusion**." (Emphasis added)

[465] The Supreme Court of Canada, in **R v McKinlay Transport Ltd**, also provided useful guidance in examining the question of reasonable expectation of privacy within the context of the statutory regime that was being reviewed in that case. These important and useful principles have been distilled from the judgment of Wilson J, at pages 644-649. In broad terms, they are summarised as follows:

i. Flexibility is key to interpreting any constitutional document including the Charter. It would be wrong for the courts to apply a rigid approach to a particular section of the Charter since that provision must be capable of application in a vast variety of legislative schemes.

ii. Since individuals have different expectations of privacy in different contexts and with regards to different kinds of information and documents, it follows that the standard of review of what is "reasonable", in a given context, must be flexible if it is to be realistic and meaningful.

iii. There is a large circle of social and business activity in which there is a very low expectation of privacy. The issue is not whether, but rather when, how much, and under what circumstance, information must be disclosed to satisfy the state's legitimate requirements.

iv. Every person who files an annual tax return may be said to enjoy a low expectation of privacy with respect to information about his income. But that is tempered by an expectation that demands for information have limits, and will be administered under terms that are fair and reasonable, as is required by section 8 of the Canadian Charter.

v. The state's interest in monitoring compliance with the legislation must be weighed against an individual's privacy interests. The greater the intrusion into the privacy interests of an individual, the more likely it will be that certain safeguards will be required (reference is made to **Hunter v Southam Inc** [1984] 2 SCR 145 for those safeguards).

vi. When the tax officials seek entry onto the private property of an individual to conduct a search or seizure, the intrusion is much greater than a mere demand for production of documents. The reason for this is that, while a taxpayer may have little expectation of privacy in relation to his business records relevant to the determination of his tax liability; he has a significant privacy interest in the inviolability of his home.

vii. Section 231(3) of the Canadian Income Tax Act provided the least intrusive means by which effective monitoring of compliance with the Act can be effected. It involves no invasion of a taxpayer's home or business premises. It simply calls for the production of records, which may be relevant to the filing of an income tax return. A taxpayer's privacy interest with regard to those documents vis-à-vis the Minister of National Revenue is relatively low.

viii. At the same time the taxpayer's privacy interest is protected as much as possible since section 241 of the Act protects the taxpayer from disclosure of his records or the information contained therein to other persons or agents.

[466] When the provisions of section 91A of the POCA are examined against this background, it is observed that they do not simply provide for the GLC to call for the production of documents or information, relative to compliance with the Regime. So, even if it is accepted, as Mr Wood has argued, that there is no, or only a low expectation of privacy, given what is to be examined and taken, the matter does not end there. Regard must be had to where the inspection is to be done and how it is to be done. The POCA authorises entry of the GLC on the private premises of regulated attorneys-at-law because it is required by the POCA to inspect their business operations. In adopting the reasoning in **R v McKinley Transport Ltd**, this intrusion is much greater than merely asking regulated attorneys-at-law to produce documents or information like the annual declaration of activities, for instance, without the need for entry on their business premises and access to their business operations.

[467] The regulated attorney-at-law, undoubtedly, has a significant and reasonable interest in the inviolability of his business operations and the premises where those are conducted. There is thus an invasion of the physical space occupied by the regulated attorney-at-law for the purposes of the POCA, which is authorised.

[468] The purpose for which the search is to be done is also a further consideration in determining the issue of expectation of privacy. The Income Tax Act in **R v McKinley Transport Ltd**, was found to be a regulatory statute which controlled the manner in which income tax was calculated and collected. It was based on self-reporting and self-assessment for the purposes of the Minister of National Revenue and no one else. This distinction between an administrative and regulatory regime, and a criminal or quasi-criminal law enforcement regime, is important to this analysis.

[469] As already established, it cannot be said that the POCA is a purely or predominantly administrative regulatory statute, which is based on self-assessment and self-reporting for the purpose and benefit of the GLC only, as was the situation in **R v McKinley Transport Ltd**. Its function under the Regime is not for the GLC's own internal regulatory machinery, and nothing else. It is, therefore, not analogous to its monitoring of the accounting processes of attorneys-at-law under the Accounting Regulations. The GLC's functions are for the benefit of the Regime designed to prevent, detect or reduce the risk of money laundering. Within this context, therefore, the GLC's role is primarily for criminal law enforcement, at the behest of the state, in ensuring the efficacy of the AML/CFT measures.

[470] This role of the GLC is evident from the fact that, unlike the Minister of National Revenue in **R v McKinley Transport Ltd**, it is empowered to not only take information and documents that it considers necessary from the business of regulated attorneys-at-law, but it can also share such information and documents obtained

therefrom with third parties. These third parties include state agents of Jamaica and foreign states. In **R v McKinley Transport Ltd**, another distinguishing feature is that the Canadian statutory regime protected the taxpayer from disclosure of his records or the information contained therein to other persons or entities. This was critical in the court concluding that the section did not infringe the taxpayer's right to be free from unreasonable search and seizure.

[471] Special note is also taken of the respondents' position that was accepted by the Full Court, that the examination to be conducted by the GLC do not amount to a search because it is the regulatory body for attorneys-at-law, and so, different considerations would apply. This reasoning, I find to be flawed for the same reasons discussed above in relation to LPP. The involvement of the GLC does not change the nature and purpose of the inspection authorised by the POCA, which has as its ultimate aim the enforcement of the criminal law. It is, therefore, cold comfort to regulated attorneys-at-law and their clients that the GLC is the examiner of their business operations. As already established, LPP is not adequately and effectively safeguarded by the Regime, even with the involvement of the GLC.

[472] The Attorney General in **Canada v FLSC**, in trying to distinguish the circumstances that obtained in **Lavallee** from those in that case, argued that **Lavallee** was inapplicable. The reason he advanced in support of that contention was that the **Lavallee** safeguards are constitutionally required in situations where law enforcement

officials are seeking evidence of criminal wrongdoing, and not, as in that case, where it was in connection with an administrative law regulatory compliance regime.

[473] In rejecting that argument, Cromwell J stated:

> "[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 Newspaper Ltd v Canada*... <u>However, I do not accept the Attorney General's contention that this scheme may be properly characterized as 'an administrative law regulatory compliance regime': ... 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</u>**.
>
> [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. <u>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</u>. 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**.
>
> ...

> [41] In short, **there is nothing about the regulatory context here or the interests of the regulator which in any way takes this regime out of the field of criminal law or diminishes in any way the very high reasonable expectation of privacy in relation to material subject to solicitor-client privilege**." (Emphasis added)

[474] I adopt that reasoning with regard to the role of the GLC and the purpose of its examination of the business operations of regulated attorneys-at-law. There is nothing about the interest of the GLC in the business operations of regulated attorneys-at-law for the purposes of the Regime that takes it out of the field of criminal law and into a purely administrative regulatory scheme.

[475] It cannot be said, in the circumstances of this case, that any information or document obtained by the GLC will only be used for its own administrative purposes. Once the document or information leaves the hands of the GLC, it has no control over it. It could be used by the state or a foreign state in carrying out criminal investigations or any other investigations against a regulated attorney-at-law or his client. All this renders the examination powers of the GLC under the Regime highly intrusive on the reasonable expectation of privacy of regulated attorneys-at-law and their clients.

[476] In these circumstances, it is not correct to say that the GLC carries out the same role as the law societies in Canada, which was under consideration in **Canada v FLSC**. The law societies had promulgated their rules to ensure compliance of attorneys-at-law with the statutory scheme. Interestingly, there was no open bridge, directly connecting that role to the law enforcement machinery of the state. The role of the law societies was truly and fully regulatory. The scheme in Jamaica is not the same. An open and

direct connection is established by the POCA between the GLC's monitoring powers and the state's criminal law enforcement apparatus, which can lead to criminal sanctions imposed on regulated attorneys-at-law. The provision empowering the GLC to take and share information with third parties (unconnected to the GLC), without the consent of regulated attorneys-at-law and the knowledge and consent of the clients, is a critical element that differentiates the role of the GLC from that of the law societies in Canada. This provision for the taking and sharing of attorney-at-law/client information with agents of the state and foreign authorities is what serves to weaken the protection of regulated attorneys-at-law from the constitutionally guaranteed right to protection from search during the inspection process of the GLC.

[477] It is observed that the POCA does not explicitly state that the GLC may share information that could aid in criminal investigations. The absence of that express provision does not mean that the GLC is not empowered to do so. The POCA has conferred that power by the wide ambit of the wording of section 91A(2). The GLC may examine, take and share information received from regulated attorneys at law in carrying out its role to ensure compliance with Part V of POCA and the Regulations made under that part. The purposes of Part V the POCA is to detect and prevent money laundering. The fact that the GLC has sought to define its role by stating that it will not be sharing documents that could assist in criminal investigations, does not remove the power conferred on it by the POCA to do so. It is the statutory power that is the focus of attention rather than what the GLC intends to do.

[478] The intrusion on the privacy rights and interests of regulated attorneys-at-law (and possibly, attorneys-at-law, in general) by the examination powers of the GLC, is even more heightened by the inadequate protection and vulnerability of LPP under the Regime. In **Lavallee**, the court held that a law office search power is unreasonable, unless it provides a high level of protection for material subject to solicitor-client privilege. The high level of protection required for LPP is absent from the Regime, as already concluded.

[479] For all these reasons, it is fair to say that the power of examination (search) and the taking of documents or information (seizure) permitted by section 91A(2) of the POCA is, presumptively, unreasonable and, therefore, would be in breach of section 13(j)(i) of the Charter. This would be so whether or not unreasonableness is an element to be established by the appellant in proving that the Regime contravenes that specific Charter rights of regulated attorneys-at-law.

Conclusion on issue (vi)

[480] I am propelled to the conclusion that the powers of the GLC under section 91A(2) of the POCA to examine, take and share, documents or information found in the possession or under the control of regulated attorneys-at-law, and in relation to which they have their constitutional right to privacy, qualify as a search and seizure for the purposes of section 13(3)(j) of the Charter. The power conferred by the POCA, broadly, constitutes an interference with all the privacy rights of regulated attorneys-at-law and their clients secured by section 13(3)(j) of the Charter.

[481] Given the wording of the Charter, with the omission of the word "unreasonable" as a specific qualifier, it would stand to reason that the appellant need not prove unreasonableness of the search or the seizure. Once there is, in fact, what amounts to a search or seizure, which is challenged as being unconstitutional, then the state should justify it under section 13(2).

[482] If that conclusion is not accepted as an accurate one, on the basis that unreasonableness is to be implied as a requirement to be proved by the appellant for the search or seizure to be unconstitutional, then the appellant would have established that the search permitted by section 91A(2) is, prima facie, unreasonable, when read within the context of the Charter as a whole. This is because it violates (or has the potential to violate) the reasonable expectation of privacy of regulated attorneys-at-law and their clients. This would be exacerbated by the fact that it would be carried out within a framework which does not offer adequate and effective protection to LPP.

[483] Apart from the reasonable expectation of privacy, the search would also be done in relation to matters in which the regulated attorneys-at-law have a constitutional right to be respected and protected under section 13(3)(j) (ii) and (iii). Those rights have been violated by the state. On this further analysis, there would also be an infringement of the Charter by the Regime, and so, for the relevant provisions to be saved, the state must prove that it is justified in a free and democratic society.

[484] There is no question that the Regime, through the powers given to the GLC, has interfered with or is likely to interfere with the reasonable expectation of privacy of

regulated attorneys-at-law in their business operations. Therefore, even if a presumption of legality is invoked in favour of the GLC, it must give way because the action of the GLC, in accordance with the powers conferred on it by the POCA, would still run afoul of the Constitution.

[485] I conclude that there is, indeed, a limitation by the Regime of the right to protection from search, guaranteed by section 13(3)(j)(i) of the Charter. The state must justify this limitation, under section 13(2) of the Charter, in the same way it must justify the limitation on the other privacy rights as found by the Full Court. The failure of the Full Court to so hold is, in my view, an error of law.

[486] The appellant is correct in its contention on this issue.

Issue (vii)

Whether the Full Court erred in finding that the disclosure, identification, verification and record-keeping requirements of the Regime are within proper limits and do not breach the constitutional rights of regulated attorneys-at-law and their duty of commitment to their client's cause (ground (z))

[487] The appellant is strongly challenging what it views as the deleterious effect of the disclosure, identification, verification and record-keeping requirements of the Regime on the independence of the Bar and on a regulated attorneys-at-law's duty of commitment to their clients' cause.

[488] The appellant's contention is that the independence of the Bar is a principle of fundamental justice, which includes an attorney-at-law's duty of commitment to the client's cause, an enduring principle, it says, that is essential to the integrity of the

administration of justice. The appellant has evoked this concept in challenging the Regime, by placing reliance on the Canadian jurisprudence.

[489] The independence of the Bar, according to the appellant, is fundamental to the way in which the legal system ought to operate and is an element of the rule of law, which is essential to the constitution of a modern democracy. This independence, it said, is no less important than an independent judiciary, since the cornerstone of an independent judiciary is an independent Bar. The measures under the Regime, it further argued, have violated or are likely to violate the client's trust in his attorney-at-law and erode the independence of the Bar.

[490] The Full Court, in paragraphs [327] to [358] of the judgment, conducted its examination of the scope and effect of the principles of the independence of the Bar and an attorney-at-law's commitment to his client's cause. After a comparative review of the Canadian and Jamaican regimes, it concluded (at paragraph [330] of the judgment), among other things, that unlike the Canadian Regime, the Regime does not contain the concept of, "principles of fundamental justice" and there would be no basis, to hold in the Jamaican context, that commitment to the client's cause is a constitutional right.

[491] The Full Court went on to opine that the nature of the information sought to be obtained in Jamaica, and the safeguards inherent in the Regime, meant that any material collected by the GLC would be within proper limits. It pointed to what it perceived to be the safeguards in the Regime, which included the high *mens rea*

threshold for suspicious transaction reporting; the adequate protection of LPP; the absence of search power on the part of the GLC; the GLC being the regulatory body for attorneys-at-law; the availability of judicial scrutiny, through disclosure orders, which are obtainable by the FID, pursuant to section 105 of the POCA (paragraphs [342-[356] of the judgment).

[492] The Full Court opined that as part of the safeguards, the courts are well aware that search powers in relation to the offices of attorneys-at-law should only be used when there is no other appropriate and less intrusive method of obtaining the information. Reference was made to the decision of this court in **The Jamaican Bar Association v The Attorney General and another; Ernest Smith & Company and others v The Attorney General of Jamaica and another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal Nos 96, 102 and 108/2003, judgment delivered 14 December 2007 (paragraph [356] of the judgment)

[493] The Full Court then proceeded to conclude, at paragraphs [357] and [358] of the judgment, to the discontentment of the appellant, that:

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

> inherent in the Regime mean that any material collected by [the GLC] would be within proper limits.
>
> [358] We are therefore of the view that the disclosure, identification, verification and retention requirements of the Regime are within proper limits. The Regime satisfies the objectives of the legislation without breaching the constitutional rights of attorneys or their clients and without causing attorneys to be in breach of their commitment to their clients' cause."

(a) <u>Are the requirements of the Regime within proper limits and do not breach the constitutional rights of regulated attorneys-at-law?</u>

This conclusion of the Full Court that the impugned requirements of the Regime are within proper limits had emanated from a flawed reasoning, which affects the accuracy of its findings.

[494] As was already concluded by the Full Court in looking at the privacy rights, the information that is required to be disclosed to the GLC or the FID relates to matters to which the constitutional right to privacy attaches. LPP is but a part of this constitutional right to privacy. So, even if LPP is well protected, other information to which LPP is not attached should, prima facie, be free from state intrusion by virtue of the protection guaranteed to it by the Charter. It follows that any intrusion in this zone is an interference in the protected sphere of the private lives (including the professional lives) of regulated attorneys-at-law and the communications between regulated attorneys-at-law and their clients, contrary to section 13(3)(j)(ii) and (iii) of the Charter. It is the Constitution that protects the material in the possession and under the control of regulated attorneys-at-law in their business operations, and not merely LPP. So, non-

privileged information is just as protected as privileged information by virtue of the Charter.

[495] Although the Full Court found that LPP was protected, it, nevertheless, found that the same requirements of the Regime that are being challenged will continue to infringe the privacy rights of regulated attorneys-at-law, guaranteed by section 13(3)(j)(ii) and (iii) of the Charter. The analysis that led the Full Court to that conclusion, with which I agree, was conducted in relation to information or communication that does not attract LPP.

[496] In speaking of the suspicious transaction reporting obligations, for instance, the Full Court had this to say:

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

[497] Similarly, in relation to the power given to the GLC to examine and take information in the possession of regulated attorneys-at-law, it found that these violate the privacy rights under section 13 (3)(j).

[498] It follows from this that the Full Court found that the disclosure requirements of the Regime have breached the privacy rights of regulated attorneys-at-law, and are continuing to do so, which called for justification from the state. Therefore, even if LPP

is adequately protected, the Regime is still in contravention of the Charter on the Full Court's own reasoning because of its impact on the constitutional rights to privacy. The Full Court, by finding that that there is violation of the privacy rights of regulated attorneys-at-law, had established by that finding of fact, that Parliament has not managed to achieve its objective, without infringing the constitutional rights of regulated attorneys-at-law.

[499] The only thing that could save those aspects of the Regime, in the light of that declared violation of the Charter, would be that the breach is justified under section 13(2). Justification does not affect the fact that there is a breach. Justification enables the legislation to pass the test of constitutionality, in spite of the breach. It is, therefore, difficult to appreciate the Full Court's conclusion (before examining whether the justificatory criterion under section 13(2) was satisfied) that the Regime has fulfilled the legislative objective, without breaching the constitutional rights of regulated attorneys-at-law.

[500] I have also found, contrary to the views of the Full Court, that there is also limitation of the liberty rights as well as the right to protection from search of regulated attorneys-at-law. These rights are inextricably intertwined with the privacy rights that the Full Court found to have been infringed. These rights are engaged because of the state's intrusion into, and interference with, a constitutionally protected sphere of the lives of regulated attorneys-at-law.

[501] In the light of the finding that the privacy rights of regulated attorneys-at-law are infringed, coupled with what I have found to be the inadequate protection afforded to LPP, and the engagement of the rights to liberty, it cannot properly be said, in the absence of justification, that the Regime is within proper limits. Neither can it be said that the Regime has satisfied the objectives of the legislature, without breaching the constitutional rights of regulated attorneys-at-law. Their constitutional rights have been infringed or are likely to be infringed.

[502] Parliament and other organs of the state are subject to the dictates of the Constitution in our system of democracy. Section 13(2)(b) of the Charter is clear and unambiguous that Parliament shall pass no law and no organ of the state shall take any action which abrogates, abridges or infringes the rights it guarantees, save as is demonstrably justified in a free and democratic society. It is for this reason that justification is warranted to save the offending provisions from a finding of unconstitutionality, in keeping with section 13(2) of the Charter.

[503] I do accept the reasoning of the Full Court that the identification, verification and record-keeping requirements, although intrusive on the privacy of clients, do serve a public purpose and can be of utility to regulated attorneys-at-law in protecting themselves from being unwittingly used in money laundering. However, those requirements do not stand alone, and without more. It is in relation to these same obligations that the GLC's powers, which are found to infringe the privacy rights, relate. It is also these same obligations that engage the liberty interests of regulated

attorneys-at-law and place them at peril of imprisonment and or disciplinary sanctions. They, therefore, cannot be treated in isolation from the other aspects of the scheme that infringe on the Charter rights of privacy and liberty and require justification.

(b) Independence of the Bar and the duty of commitment to the client's cause

[504] The Full Court found that the Regime is not inconsistent with the position of regulated attorneys-at-law in their traditional role in the administration of justice and the maintenance of the rule of law. There is no ground of appeal, specifically challenging this finding, albeit that submissions have been made that the Regime has undermined the role of the attorney-at-law in the administration of justice. The issue is taken under ground (z) with the Full Court's finding that there is no breach of the duty of commitment to the client's cause, which is accepted to be a component of the independence of the Bar.

[505] The concept of the independence of the Bar and an attorney-at-law's duty of commitment to his client's cause were addressed by Cromwell J in **Canada v FLSC**. He opined that the principle of the independence of the Bar would apply in two ways, that is, in a broad sense as well as in a narrow sense. In the broad sense, it means that regulated attorneys-at-law are to be free from intrusion from the state. In the narrower sense, it means that the state cannot impose duties on them that interfere with their duty of commitment to advancing their clients' legitimate interests. He noted that the narrower, more focused version, is anchored in concern about state interference with the lawyer's commitment to the client's cause. He then identified the narrower principle

as the one most relevant to the case he was considering. He concluded (at paragraph [83]) that the lawyer's duty of commitment to the client's cause also required some measure of constitutional protection against government intrusion; in his words:

> "[83] ... 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, recognise 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."

[506] The minority view of McLachlin CJ and Moldaver J did not accord with the view of Cromwell J, which was accepted by the majority. The minority view on this issue was expressed at paragraphs [119]-[120] of the judgment in these terms:

> "[119] However, we respectfully disagree with the approach taken by our colleague in his analysis of s 7 of the Charter. To the extent that the s 7 interests of the lawyer are engaged, we do not share our colleague's view that the principle of fundamental justice that would be offended is the lawyer's commitment to the client's cause. In our view, this 'principle' lacks sufficient certainty to constitute a principle of fundamental justice: see *R v Malmo-Levine*, 2003 SCC 74, [2003] 3 SCR 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 recognises 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 recognised as a constitutional norm. ..."

[507] There is no doubt that the Regime serves to regulate the business operations and professional relationships of regulated attorneys-at-law in specified circumstances. They are required to implement a number of measures that could prove quite costly and burdensome. They are also required to disclose client information, which if they have a free choice, they would not do on their own initiative. It does divide the loyalty of regulated attorneys-at-law between the state and their client, especially with regards to suspicious transaction reporting and tipping off. There is no question that the measures are highly intrusive on the independence of the regulated attorneys-at-law.

[508] The contention of the appellant, through the evidence of Mr Donovan Walker, is that the evidence of the Government has established that it is not necessary for attorneys-at-law to be labelled as DNFIs because they are obliged to comply with the general provisions of the POCA, in any event, and they still utilise financial institutions who may make suspicious transaction reports about them. It is unnecessary to encroach on the independence of the Bar, privilege and confidentially, which are safeguards of the Constitution in order to protect the financial system, Mr Walker contended.

[509] The independence of the Bar, however, while important in every free and democratic society is, in and of itself, not absolute. Parliament can make laws that curtail such independence, if it is considered necessary for the peace, good order and government of the country. That is a decision for Parliament alone to make, pursuant to

section 48(1) of the Constitution. Despite what may appear to be unfair or burdensome in some of the provisions of the Regime, the duty of the court is not to interfere with laws passed by Parliament on such bases. It can only interfere where such law is, unjustifiably, in conflict with the Constitution. While an independent Bar may have implications for some Charter rights, independence of the Bar, in the broad sense, is not, of itself, elevated to a constitutional right.

[510] There is, accordingly, no need to attribute to it constitutional protection so that it should be said that the Regime should not be extended to attorneys-at-law. Some rights and freedoms, simply, have to give way for the greater good. A limit on the independence of attorneys-at-law, in treating with their clients in certain circumstances happens to be one of them identified by Parliament to be required in the national interest.

[511] The same consideration applies to what the appellant has called their duty of commitment to their clients' cause. I agree with the minority view expressed in **Canada v FLSC**, that this concept is not of sufficient "certainty" to constitute a constitutional norm or "a workable constitutional standard". The Full Court had accepted that view and held that given the fact that the Charter does not contain the concept of principles of fundamental justice, there would be no basis to hold, in the Jamaican context, that commitment to the client's cause is a constitutional right. There is no basis on which this conclusion can properly be disturbed.

[512] Therefore, even though there is an intrusion by the Regime on the independence of the Bar, that, in and of itself, is not elevated to a breach of a constitutional right, which could justify interference by the court with the Regime.

[513] The critical question is whether Parliament has managed to achieve its legislative objective, in a manner and on terms, consistent with the framework created by the Charter for the effective protection of the rights and freedoms that it seeks to secure in a free and democratic society. It is to that ultimate question which relates to the justification of the impugned aspects of the Regime that issues pertaining to the independence of the Bar may have some relevance; that issue will now be examined.

Issue (viii)

Whether the limitations on, or infringements of Charter rights by the Regime, are demonstrably justified in a free and democratic society (grounds (aa)(i), (bb), (cc) and (w)(ii))

[514] The Full Court, in determining whether the Regime is justified, given the breach of the privacy rights under section 13(3)(j)(ii) and (iii), applied the **Oakes** test in treating with the issue of justification.

[515] According to the **Oakes** test, there are two central criteria to be satisfied in order to establish that a limit is demonstrably justified in a free and democratic society. The first is that the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. The standard must be high in order to ensure that objectives, which are trivial or discordant with the principles

integral to a free and democratic society, do not gain the constitutional protection afforded by the justificatory criterion.

[516] The second criterion is that once a sufficiently significant objective is recognised, the party invoking the exception must show that the means chosen are reasonable and demonstrably justified. This, it is said, involves a form of proportionality test. The proportionality test comprises three important components, which are:

i. the measures must not be arbitrary, unfair or based on irrational considerations;

ii. they must be rationally connected to the objective, and should impair "as little as possible" the right or freedom in question (that is, there should be minimal impairment of the right or freedom); and

iii. there must be proportionality between the effects of the measures, which are responsible for limiting the Charter right or freedom, and the objective identified to be of sufficient importance.

[517] It has been noted by Andrew S Butler (Limiting Rights, page 569), that the **Oakes**' stipulation at item (ii) above, that in order to be proportionate, a limiting measure must impair the right or freedom "as least as possible" …"came to be regarded as too stringent and too demanding a standard", and so, has been modified. Shortly

after **R v Oakes**, Dickson CJ in **R v Edwards Books and Art Ltd**, modified that requirement by applying the test of whether the law or the act in question infringes the protected right *"as little as is reasonably possible"*. This is a less stringent test than that in **R v Oakes**. Indeed, as Andrew S Butler highlighted, there have been Canadian cases, which have replaced the minimal impairment test, which was the focus in **R v Oakes**, to the concept of "excessive impairment" as the measure (see **R v Sharpe** [2001] 1 SCR 43 at paragraph 78). This gradual modification in the **Oakes** test is aimed at causing less restraint on the exercise of Parliament's law making power.

[518] Given the default position in section 13(2) of the Charter, however, that the rights are guaranteed and ought to be preserved, as a general rule, it does seem reasonable to apply the **Oakes** test in its classic form. It was the classic minimal impairment test that the Full Court applied, albeit that at the time, it had been modified by Dickson CJ, himself, who had established the test in **Oakes v R**. I would not hold the Full Court to be wrong, in principle. However, since, the essence of the proportionality test involves a balancing exercise between the rights of Parliament to make laws for the peace, good order and government of the country and the rights of the individual to protection from state intrusion, it seems justified that some latitude is accorded to the exercise of Parliamentary discretion. The modified **Oakes** test that the law must infringe the right "as least as is *reasonably* possible" is endorsed as a better approach.

[519] The nature of the proportionality test, it is also said, will vary depending on the circumstances and in each case, the court will be required to balance the interests of society with those of individuals and groups.

[520] It was also pointed out in **R v Oakes**, that even if an objective is of sufficient importance and the first two elements of the proportionality tests are satisfied, it is still possible that because of the severity of the deleterious effects of the measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

[521] It is accepted that although the word "reasonable" is absent from section 13(2) of the Charter, there still is implicit in the requirement for justification the need for the legislative measure to be reasonable in its terms and effect.

[522] The appellant has managed to establish that the Regime has abrogated, abridged or infringed (or is likely to do so) the Charter rights of regulated attorneys-at-law and/or their clients, guaranteed by sections 13(3)(a) and 13(3)(j). These, of course, are the regulated attorney-at-law's right to liberty; the right not to be deprived of their liberty; the right to be free from search; and the right to respect for and protection of privacy in their private life (which includes their professional life), property and communication.

[523] It is accepted that the rights are not absolute as the Full Court opined. However, they are rights and freedoms of immense value to every individual in a free and democratic society.

[524] As already indicated, Article 8 of the Convention provides a useful guide in the analysis of the rights to privacy enshrined in section 13(3)(j). The Article provides specific qualifiers in paragraph (2) that would place limitations on the rights it seeks to secure. The qualifiers are that the interference with privacy rights is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

[525] This provision is not present in the Charter in these explicit terms. This is not to say, however, that it could not be applied to Charter cases involving privacy rights under section 13(3)(j), since what is required in a free and democratic society would, undoubtedly, embrace the same considerations as stated in paragraph (2) of Article 8. The Full Court was also of that view as expressed at paragraph [253] of its judgment. There, it stated that a consideration of paragraph (2) of Article 8 clearly reveals some of the factors it was obliged to consider in evaluating whether any interference with the privacy rights that it had found were infringed, is demonstrably justified. This was stated by the Full Court thusly:

> "[253] ...In applying the principles of ***Michaud***, it is clear that the importance of attorney/client confidentiality has to

> be weighed against the society's interest in the combating of money laundering and thus the enhancing of the investigative and law enforcement protocols to achieve that aim. It also has to be weighed against the fact that the recording and maintaining of records are generally required outside of privileged circumstances due to the nature of the activities for which they are required."

[526] The Full Court, after engaging in its section 13(2) analysis, concluded that the infringement of regulated attorneys-at-law privacy rights represents minimal interference and is demonstrably justified. In coming to that conclusion, the Full Court took into account several considerations that have been found to be flawed. Those relate to the protection of LPP, the limitation on the rights to liberty and protection from search, and its determination that the measures are within proper limits before proceeding to justification. The flawed reasoning and conclusions on those critical matters have rendered questionable the accuracy of the Full Court's conclusion that the state has discharged the burden cast on it under section 13(2) to save the constitutionality of the Regime. It is to an investigation of that ultimate finding that I will now turn by an analysis within the legal framework of the modified **Oakes** test.

(a) <u>The importance of the legislative objective</u>

[527] The Full Court concluded that the objective to be served is of sufficient importance such as to warrant the infringement of the rights to privacy under section 13(3)(j)(ii) and (iii) of the Charter. It found that the evidence proffered on behalf of the 1st respondent makes it clear that money laundering perpetuates high levels of criminal activities which negatively impacts national development and cripples the country's standing in the international community. The gravity of the situation, it said, is evident

from the fact that the Government of Jamaica thought it prudent to include money laundering and facilitators who launder the proceeds of crime as Tier 1 threats in the National Security Policy.

[528] The critical point of departure for the purposes of this aspect of the analysis is a consideration of the evidence presented by the state, as outlined above. The evidence put forward by the 1st respondent as justification has focused primarily on the effect of organised crime on the country and the global community; the role or potential role of attorneys-at-law in money laundering and terrorism financing; the deleterious impact that Jamaica's failure to comply with its international obligations for the curtailment or eradication of organised crime could have locally and internationally; and the requirements of the international and regional instruments and organisations for the measures to be extended to attorneys-at-law.

[529] Having examined the evidence and submissions presented by the parties in relation to this issue, I find that the state does not lack good reasons for seeking to extend the measures to attorneys-at-law. The need to maintain an independent Bar, in both senses of the term, cannot be taken as a limit on the right of the state to make laws for the governance of the country. I appreciate the 1st respondent's position that money laundering and terrorism financing pose a clear and present danger to Jamaica, and so, it would not be sufficient and effective for the state to focus only on financial institutions in the light of evidence that attorneys-at-law, among others, are conduits for the commission of those criminal activities. The Full Court is, indeed, correct that

the Government's focus on attorneys-at-law, as a group to be regulated in the fight against money laundering and terrorism financing, is not at all misplaced. This is recognised the world over.

[530] I also accept Dr Barnett's submissions on behalf of the GLC, that the evidence is clear and uncontradicted that the circumstances of criminal activity, and the threat from international crimes, make it necessary for members of the international community to cooperate in the implementation of measures for the control of money laundering and other transnational crimes. This, indeed, is the objective of the Regime.

[531] There is, indeed, a pressing social need to extend the AML/CFT measures to attorneys-at-law. The state's decision to interfere with the privacy of attorneys-at-law in their interaction and communication with their clients, which is protected by section 13(3)(j)(ii) and (iii), does have a legitimate aim and is not irrational. This is especially so in the absence of any rules promulgated by the GLC, prior to the Regime, to secure effective compliance with AML/ CFT measures.

[532] Although the Full Court did not find a breach of the liberty rights and the right to be protected from search, those rights are engaged by the Regime, as I have found and so justification from the state is warranted. In my view, placing limitation on those rights, in principle, is also not irrational based on the evidence proffered and the importance of the legislative objective.

[533] An important point to note in this aspect of the analysis, however, is that from the provisions of the POCA, it is evident that Parliament does not intend to override

LPP, even in its effort to achieve the legislative objective. It, therefore, leaves room for one to argue that regardless of the pressing social concerns behind the passing of the legislation, and the importance of the legislative objective, LPP must be protected. That is the intention of Parliament. It means that where LPP is left vulnerable and at risk, as I have concluded, it is not enough to say that the importance of the legislative objective justifies interference with it. Where the right at risk embodies LPP, then according to the authorities, LPP cannot be balanced against the needs of law enforcement. It follows, then, that given the value of LPP in a free and democratic society and the intention of Parliament that it is not to be overridden in the enforcement of the POCA, a heavier burden is cast on the Government to justify the infringement of the rights to privacy, to which LPP attaches. It cannot seek refuge in the importance of the legislative objective, given the threat to LPP.

(b) <u>Whether the legislative objective is rationally connected to the limit</u>

[534] There is also enough evidence to satisfy the court that the legislative objective is rationally connected to the limit being placed on the Charter rights of privacy (including protection from search), given that it is intended that LPP is not to be adversely affected. As Cromwell J, attractively puts it in **Canada v FLSC**, there is a "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".

[535] The Full Court had also opined that Parliament had not gone further than was necessary to interfere with the privacy rights of attorneys-at-law because the Regime

only imposes obligations on attorneys-at-law when they engage in the six distinct activities. This specific focus it says, clearly illustrates that its objective is not to arbitrarily interfere with the rights of attorneys-at-law but rather to effectively address a critical social concern. This view is accepted. I would also add that Parliament does not intend to arbitrarily interfere with the rights of attorneys-at-law, particularly, given the evidence that no specific regulatory framework had existed to apply to them law for the prevention of money laundering and terrorism financing and its provision that LPP is not to be interfered with.

(c) Are the measures reasonable and carefully designed to achieve the legislative objective?

[536] Even though the legislative objective to detect and deter money laundering through the involvement of attorneys-at-law, is important and laudable, and the resultant limitation on the affected Charter rights rationally connected to that objective, that is not enough to justify the Regime as constitutional. To be constitutional, the Regime must also be reasonable and proportionate. To be so, the measures designed to achieve the objective must be carefully designed and must not be arbitrary, unfair or based on irrational considerations. They should limit the right that is engaged as minimally as is reasonably possible.

[537] The appellant's arguments, as set out in ground of appeal (aa)(i), that the Full Court erred in applying the proportionality test cannot, be accepted.

[538] The Full Court, in concluding that the Regime is justified, stated that it is indeed an appropriate, adequate and proportionate response to the national and international

fight against money laundering. While I do agree that the intent of the legislature is not to arbitrarily interfere with the rights of regulated attorneys-at-law, it is not established, as found by the Full Court, that the Regime is adequate and proportionate. The ultimate effect of the measures happen to unreasonably interfere with the privacy rights, including the right to protection from search, of regulated attorneys-at-law in the absence of an appropriately designed structure for the protection of LPP and attorney-at-law/client confidentiality, in general. The available evidence does not offer sufficient support for the Full Court's finding of adequacy of the Regime for the protection of the rights.

[539] I, once again, would direct focus on the impact of the Regime on LPP. Although Parliament's intention is that LPP must remain unscathed by the Regime, the absence of any express provision in the POCA for a fixed and identifiable structure for the protection of LPP reduces the efficacy of the legislative scheme in securing LPP. The POCA does not produce rules and procedures that are sufficiently precise for regulated attorneys-at-law, who are the gatekeepers of their client's right to LPP, to properly protect it. Placing the burden solely on them to safeguard a legal and fundamental right that does not belong to them, is unreasonable.

[540] The absence of provisions for judicial intervention or other types of filter mechanism, in the absence of any opportunity given to clients to assert LPP, is a fundamental flaw in the Regime that renders it even more unreasonable.

[541] In the reference to the European Commission of Human Rights in **G v Federal Republic of Germany**, application no 13079/87, judgment delivered 6 March 1989, it was stated that:

> "...[L]egal provisions which interfere with individual rights must be adequately accessible, and formulated with sufficient precision to enable the citizen to regulate his conduct..."

[542] The Regime has failed in this regard. It cannot be said that the legislative framework is adequately accessible to the citizens, whose right to interact privately and freely with their legal representative is a necessary component of a free and democratic society. It is the client to whom LPP belongs and to leave him without recourse to protect his interest is a fundamental shortcoming in the Regime. This is not consistent with what is required in a free and democratic society, given the role and importance of LPP and the protection afforded by the Constitution to the right to privacy of communication.

[543] The simple, yet essential, requirement for the protection of LPP is the existence of proper and effective procedural safeguards to ensure that it remains as close to absolute as possible. Parliament must make such provision if it is its genuine intention (and that is not doubted) that there should be no interference with LPP. I am convinced on the material presented by the parties before this court, that far more could have been done to eradicate or, at least, minimise, to an acceptable level, the risk posed to to LPP.

[544] In relation to the aspect of the Regime permitting the sharing of information by the GLC, the Full Court reasoned at paragraph [215]:

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

[545] It is accepted that sharing of information is one of the key aims of international cooperation aimed at combating organised crime. The legislative provisions of Parliament and the treaty obligations to this end are, nevertheless, subject to the supreme law of the land. The Constitution, however, does not permit the breach of the fundamental rights and freedoms of the citizens on the mere basis of demands for international cooperation to fight crime. The Constitution is there to guard against unreasonableness and excesses on the part of the state, regardless of the reason, context or purpose for the exercise of its powers.

[546] The need for Jamaica to comply with international treaty obligations is subject to the Charter. It must aim to do so without violating the Charter and where it does so, that violation must be demonstrably justified in order to pass the court's scrutiny.

[547] In **Michaud v France** at paragraph 102, the ECtHR stated in similar vein:

> "102 **The Court reiterates that absolving the Contracting States completely from their Convention responsibility where they were simply complying with their obligations as members of an international organisation to which they had transferred a part of their sovereignty would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards. In other words, the States remain responsible under the Convention for the measures they take to comply with their international legal obligations, even when those obligations stem from their membership of an international organisation to which they have transferred part of their sovereignty**..." (Emphasis added)

[548] The sharing of such information at an international level must, therefore, be within the strictures of clearly prescribed safeguards for the effective protection of the fundamental rights of regulated attorneys-at-law and their clients, including LPP.

[549] Even if, as Mr Wood had contended, there is a low expectation of privacy on the part of regulated attorneys-at-law in dealing with the GLC, the same low expectation of privacy would not be held in relation to agents of the state and especially agents of a foreign state. Furthermore, the clients to whom the duty of confidentiality is owed, would not reasonably expect that information they disclosed within that legally protected context could someday reach the hands of a foreign state.

[550] The fact that this is possible and foreseeable is evidenced in the provisions of section 91A(2)(d)(ii), which stipulates that the GLC may enter into an arrangement

(including getting undertakings from) with specified third party state agents, including agents of foreign states, concerning disclosure of privileged information. This would suggest that Parliament had it in its contemplation that privileged as well as non-privileged information may reach the hands of the GLC and be shared wth foreign states upon proper arrangement made by the GLC to prevent disclosure one it is in their hands. It, therefore, provides protection for privileged information within this context. POCA, however, does not make it mandatory for the GLC to establish such procedural safeguards as a matter of course in sharing information with state agents. This is left to the discretion of the GLC. This is a frailty in the Regime. There should be a strengthening of the area for the sharing of information with state agents to protect LPP and the Charter rights of regulated attorneys-at-law. The absence of any facility for resort to prior judicial intervention for such disclosure to be made, especially to agents of foreign states, is a matter of grave concern.

[551] In relation to France's AML/CFT measures, which were the subject of consideration in **Michaud**, there was specific express provision within that statutory framework, which treated with the divulgence of the existence and content of confidential information in the possession of lawyers. There was also express prohibition on certain types of disclosure by state agents, the breach of which was made punishable by a fine. There is no provision for sanction relating to disclosure of confidential and privileged information collected from regulated attorneys-at-law by the GLC or anyone. The absence of sanctions to act as deterrence to the detrimental disclosure of client information weakens any protection for LPP there may be.

[552] The Full Court had also highlighted, as a material consideration, that the Law Societies' Rules in Canada were not challenged as being unconstitutional, although the law societies had the power to examine the business operations of attorneys-at-law, like the GLC in the case of regulated attorneys-at-law in Jamaica. The fact is, however, that there was no legislative obligation on the law societies to take information from their members with the liberty to share with state agents of Canada and of foreign states. It was the FINTRAC that had such power in Canada and it was challenged by the law societies and denounced by the court.

[553] The extraterritorial reach of the powers conferred on the GLC renders it more crucial for there to be effective protection of LPP and the constitutional rights to privacy of regulated attorneys-at-law and their clients. In a society where there is a constitutional right to privacy of communication and no data protection law in place to police the divulgence of information, more scrupulous effort must be made to demonstrably safeguard the privacy and confidentiality of communication between attorneys-at-law and their clients. This is a constitutional right and a positive feature of every free and democratic state.

[554] The assertion of the GLC that it will not be assisting in criminal investigations does not minimise or eliminate the dangers inherent in the statutory powers with which it is conferred. As I have indicated before, it is not what the GLC intends to do that is critical, but rather, what the POCA has empowered it to do. Furthermore, as indicated before, the GLC could, one day, be replaced as the competent authority for regulated

attorneys-at-law. Therefore, the mischief is not in the GLC's intended course of action or approach but in the legislative prescriptions that govern its functions, which would stand regardless of who the competent authority may be.

[555] The sharing of documents or information taken from regulated attorneys-at-law with third parties (over whom they have no control and with whom they have no relationship), is not to be done within a framework that is carefully designed to secure impairment, as least as is reasonably possible of the right to confidentiality in communication and other constitutionally guaranteed privacy rights under section 13(3)(j). The provision for the sharing of information interferes with professional confidentiality and privacy in communication to an unacceptable degree in the light of the inadequate protection afforded to LPP.

[556] In respect of the liberty interests, the Regime, by interfering with the privacy rights (including the right to protection from search), has, at the same time, engaged the liberty rights of regulated attorneys-at-law. The liberty rights are engaged in circumstances, where there would be a violation by the state of the privacy rights in contravention of the Charter. This would be amidst inadequate safeguards for the protection of LPP and confidentiality. By punishing regulated attorneys-at-law for conduct emanating from or connected to the state's violation of their privacy rights and within the context of the absence of fair procedures established by law for the protection of LPP, the state, in effect, would be punishing them for doing nothing wrong. This must be viewed as unreasonable and unfair.

[557] Note is also taken of the Regime's treatment of tipping off, which tends to divide the loyalty of regulated attorneys-at-law between their clients and the state. The liberty interests of regulated attorneys-at-law are seriously engaged by this provision because breach of it may lead to imprisonment of up to 10 years (section 98(2) of the POCA). Yet, in the United Kingdom, which has similar AML/CFT measures in relation to the legal profession, Parliament, as far back as 2007, had changed that provision to permit legal advisers to inform their clients of disclosure prohibited by the tipping off provisions for the purposes of dissuading them from engaging in conduct amounting to an offence (see section 333D of the Proceeds of Crime Act (UK)).

[558] Given the constraining effect of the tipping off provision on the duty of confidentiality of regulated attorneys-at-law and their loyalty to their clients, key components of the independence of the Bar in a free and democratic democracy, it cannot reasonably be said that the measures are carefully designed to achieve reasonableness and the least reasonably possible impairment of the rights to liberty. This is not to say that the same provisions in the UK ought to be followed; it is merely used as an example to illustrate the point that there are creative measures that can be devised to cause the least impairment as is reasonably possible to the liberty rights of attorneys-at-law in their relationship with their clients.

[559] While it is clear that some aspects of the Regime do serve a public interest purpose, which is laudable, it cannot be disputed that some key aspects of it are unreasonable, and unfair. This is because of the absence of fair procedural safeguards,

and a carefully designed scheme to achieve the legislative objective, with the least reasonably possible impairment of Charter rights.

[560] The court, as guardian of the Constitution, cannot endorse or rubber stamp what has presented itself as a laconic or short-sighted approach in devising legislation which would have been known was bound to infringe the Charter rights of the persons it was aimed at, thereby coming in conflict with the Constitution. Consideration must be given to the need to achieve reasonableness and minimal impairment of the constitutional rights of regulated attorneys-at-law and their clients, within the letter and spirit of the Charter, if attorneys-at-law are to be properly regulated for the purposes of the POCA. This is required to satisfy the test of proportionality. The regime fails on this aspect of the test. This alone would be sufficient to find that the Regime is not demonstrably justified. I will go on, however, to show another basis on which the state has failed to discharge the burden cast on it to justify the infringement or limitations of the engaged Charter rights.

(d) Whether alternative means of achieving the objective is available

[561] On the dictates of the **Oakes** test, the Government is also duty bound to show, by evidence, that no reasonable alternative means of achieving the same objective with less impact on Charter rights was available to it at the time the measures were introduced.

[562] In **R v Oakes**, Dickson CJ instructed, in treating with the Canadian equivalent to section 13(2) of the Charter:

> "Having regard to the fact that section s 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be, in the words of Lord Denning, 'commensurate with the occasion'. Where evidence is required in order to prove the constituent elements of a s 1 inquiry, and this will generally be the case, **it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit… A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions.** I should add, however, that there may be cases where certain elements of the s 1 analysis are obvious and self-evident." (Emphasis added)

[563] The pertinent question, to borrow the words of Dickson CJ, is this: is there some reasonable alternative scheme which would allow the Government to achieve its objective with fewer detrimental effects on the privacy and liberty rights of regulated attorneys-at-law? (see **R v Edwards Books and Art Ltd** page 772 to 773).

[564] The evidence adduced by the 1st respondent on behalf of the Government, unfortunately, has not gone far enough to satisfy this aspect of the proportionality test. The evidence of Mr Stephens is that over a six year period, the FID ha received reports of over 200 suspicious transaction reports pertaining to attorneys-at-law in Jamaica which resulted in two arrest and investigations of others. There is no reported conviction. What the evidence has not established is that there is no other equally dissuasive and reasonable measure that is available to the Government to achieve the same objective.

[565] Mr Wood on behalf of the GLC, pointed to the fact that FATF had enjoined the legislature to look at the sanctions and to ensure that there are proportionate

dissuasive means, whether civil, criminal or administrative, to address the issues of money laundering and terrorism financing. He noted that it makes no sense to take matters that can be dealt with by a regulatory disciplinary procedure, and criminalise them. This would impose additional burden on the courts, which are already overburdened, he maintained. Given the backlog in the court system, he said, the state could end up with a system that is not sufficiently dissuasive.

[566] Mr Wood's submissions are important in two critical respects and seem not to be in conflict with the appellant's position. Firstly, the arguments serve to highlight the point that it was reasonably possible for other reasonable alternative means to have been considered as equally effective ways to achieve the legislative objective to have attorneys-at-law regulated because FATF had recommended that considerations may be given by member states to non-criminal schemes. This means that an alternative measure of a self-regulatory monitoring regime was clearly in the contemplation of FATF for the government to consider and there are many good examples provided by other free and democratic states, which could serve as useful guides.

[567] The second point that is extracted from Mr Wood's observation is whether consideration could have been given to the reasonable practicality of a regulatory disciplinary scheme. Any such scheme would, of course, be less detrimental to the liberty rights of attorneys-at-law. Mr Wood's argument, in this regard, is not at odds with the views expressed by Mr Walker, who pointed to the virtues of a self - regulatory administrative scheme. He deposed, among other things, that the GLC has guarded

jealously the reputation of the legal possession as a whole and is known for its strict treatment of complaints against attorneys-at-law.

[568] This is not to say that Parliament is obliged to adopt a wholly administrative scheme or any other non-criminal law scheme to ensure compliance with the AML/CFT measures. However, on the basis of the **Oakes** test, the 1st respondent would have been duty bound to produce evidence to show that no other suitable and reasonable alternative was available at the time the Government decided to elect a system for compliance by attorneys-at-law, which would result in less impairment of the infringed Charter rights. This is particularly against the background that it must have been clear to the Government, as evidenced by the provisions concerning LPP, that it was encroaching on a zone, which has enjoyed, and continues to enjoy, special protection from the law in a free and democratic society.

[569] There is nothing from the affidavit evidence adduced by the 1st respondent, which serves to demonstrate that the executive or the legislature had considered less intrusive measures but had found them to be wanting, potentially less dissuasive and, therefore, more ineffectual to achieve the legislative objective.

[570] In this case, there are competing public interests values at work. However, the national or international interest to deal with organised crime, cannot, without proper justification, trump the public interest that LPP and attorney-at-law/client confidentiality, be preserved for the benefit of a free and democratic society, governed by the rule of law. In **B and others v Auckland District Law Society and another**

[2003] UKPC 38, at paragraph 50, the Privy Council referenced **R v Derby Magistrates' Court, ex parte B**, in which the House of Lords rejected the argument that legal professional privilege is an interest which falls to be balanced against competing public interests. Lord Taylor of Gosforth CJ, in the latter case, stated at page 540:

> "...[T]he drawback to that approach is that once any exception to the general rule is allowed, the client's confidence is necessarily lost. The solicitor, instead of being able to tell his client that anything which the client might say would never in any circumstances be revealed without his consent, would have to qualify his assurance. He would have to tell the client that his confidence might be broken if in some future case the court were to hold that he no longer had 'any recognisable interest' in asserting his privilege. One can see at once that the purpose of the privilege would thereby be undermined."

The Privy Council also referenced the dictum of Lord Lloyd of Berwick in which he rejected the idea that a balancing exercise was required. He stated at page 509:

> "…the courts have for very many years regarded legal professional privilege as the predominant public interest. A balancing exercise is not required in individual cases because the balance must always come down in favour of upholding the privilege…"

[571] In our context, since 2011, with the passage of the Charter, the right to respect for confidentiality is a constitutional right. LPP is, therefore, strengthened by the Charter. While the rights are not absolute, any infringement of them, however, calls for demonstrable justification from the violator in order for the infringement to be saved as constitutional.

[572] The same reasoning applies to the liberty rights. The threat of imprisonment, which looms large under the Regime, is a matter that cannot be taken lightly as it engages the liberty interests of regulated attorneys-at-law in a real and substantial way. They must not be easily restricted or trampled on for any reason, including national security and the economic well-being of the state. As Lord Hoffmann in **Secretary of State for the Home Department v JJ**, opined at paragraph [37] of the judgment:

> "**Why is deprivation of liberty regarded as so quintessential a human right that it trumps even the interests of national security?** In my opinion, because it amounts to a complete deprivation of human autonomy and dignity. The prisoner has no freedom of choice about anything. ...He is entirely subject to the will of others."

[573] I conclude that the government has failed to establish proportionality on the basis that no other equally effective alternative was available to it to achieve the legislative objective.

(e) <u>The salutary effect of the measures versus the infringements of the Charter Rights</u>

[574] The Regime, having failed the above two limbs of the proportionality test should not pass Charter scrutiny. I would, in any event, state that in all the circumstances as discussed above, I would not hesitate to declare that the salutary effects of the legislative measures to have attorneys-at-law regulated have not outweighed the deleterious effects on the Charter rights of privacy and liberty, that are occasioned by the Regime.

[575] The court cannot, for expediency, abdicate its role to ensure that the values and intendment of the Charter are upheld for the benefit of all persons in Jamaica, which would include attorneys-at-law and their clients.

[576] In **RJR-MacDonald Inc v Canada (Attorney General)** [1995] 3 SCR 199, at paragraphs 126 - 136, McLachlin J (as she then was) made some compelling arguments in treating with the constitutional requirement for state justification, under section 1 of the Canadian Charter, where a Charter right is adversely affected by legislation. I, wholeheartedly, endorse portions of her dictum in conducting my analysis of the requirement for justification in section 13(2). Regrettably, I cannot improve on the eloquence and clarity of her ladyship's pronouncements, and so, I have adopted them in, more or less, unmodified terms. For mere ease of reference, however, I have taken the liberty to set out the salient aspects of them in point form. I intend no disrespect to Her Ladyships' formulation. Barring the words in square brackets, she stated as follows:

i. First, to be saved under [section 13(2) of the Charter] the party defending the law (here the Attorney General of [Jamaica]) must show that the law which violates the right or freedom guaranteed by the Charter is "reasonable". In other words, the infringing measure must be justifiable by the processes of reason and rationality (paragraph 127).

ii. The question is not whether the measure is popular or accords with the current public opinion polls. The question is rather

whether it can be justified by application of the processes of reason. In the legal context, reason imports the notion of inference from evidence or established truths. This is not to deny intuition its role, or to require proof to the standards required by science in every case, but it is to insist on a rational, reasoned defensibility (paragraph 127).

iii. Second, to meet its burden under [section 13(2)] of the Charter], the state must show that the violative law is "demonstrably justified". The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths (paragraph 128).

iv. The bottom line is this: while remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must, nevertheless, insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this

bottom line if the rights conferred by the Constitution are to have force and meaning (paragraph 129).

v. The task is not easily discharged, and may require the courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional rights. No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail (paragraph 129).

vi. While the impugned law must be considered in its social and economic context, nothing in the jurisprudence suggests that the contextual approach reduces the obligation on the state to meet the burden of demonstrating that the limitation on rights imposed by the law is reasonable and justified. Context is essential in determining legislative objective and proportionality, but it cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the best judge. This would be to undercut the obligation on Parliament to justify limitations which it places on Charter rights and would

be to substitute *ad hoc* judicial discretion for the reasoned demonstration contemplated by the Charter (paragraph 134).

vii. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament (paragraph 136).

viii. To carry judicial deference to the point of accepting Parliament's view, simply, on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which the Constitution and the nation is founded (paragraph 136).

Conclusion on issue (viii)

[577] There is an undoubtedly salutary and important objective in the implementation of measures to bring attorneys-at-law within the regulated sector. There is ample evidence to justify the extension to them of AML/CFT measures as part of the regulated sector, since there was no previous provision under Jamaican law specifically treating

with them as a group of special interest in the anti-money laundering and the counter financing of terrorism strategies of the state.

[578] The importance of the legislative objective, however, cannot override LPP which Parliament, itself, intends to be protected, hence the provisions in the POCA.

[579] There is also sufficient evidence that satisfies the threshold requirement that there is a rational connection between the legislative objective and the limit on the Charter right.

[580] I am persuaded to the view, advanced by the appellant, that the state has not satisfied the section 13(2) justificatory criterion that any infringement of a Charter right must be demonstrably justified in a free and democratic society. The evidence presented by the state has failed to demonstrate that it was not possible or, at least, reasonably practicable, to reasonably minimise, to an acceptable degree, the infringement of, or limitations on, the regulated attorney-at-law's rights to privacy and liberty. The measures designed are not the most reasonable, fair and less intrusive that could reasonably have been devised in the circumstances to ensure the least impairment as far as is reasonably possible of such intrinsic and important rights guaranteed by the Constitution to attorneys-at-law and the clients they serve.

[581] The appellant is, therefore, not wrong in its contention that the Full Court erred in finding that the infringement of their privacy rights (in their private life and communication) is demonstrably justified in a free and democratic society. At bottom line, it erred in finding the Regime to be constitutional.

Issue (ix)

Whether the Full Court erred or wrongly exercised its discretion in refusing to grant the orders sought in the fixed date claim form, which challenged the constitutionality of the Regime (ground (a))

[582] In the absence of justification, the Regime cannot be upheld as being constitutional in so far as it concerns attorneys-at-law. The appellant, on that basis alone, ought to have succeeded in challenging the Regime in the court below. The appellant would have proved its case and the Government would have failed in its evidential and legal duty to uphold the constitutionality of the Regime.

[583] There is sufficient basis on which this court can safely conclude that the Full Court fell in error in its finding that the Regime is constitutional and in its refusal to grant the appellant a declaration to that effect in relation to sections 13(3)(j)(i),(ii) and (iii) and 13(3)(a) of the Charter.

[584] It must be said, however, that the Full Court was not entirely wrong to deny the appellant some of the declarations sought in the fixed date claim form. The appellant sought 11 declarations in terms that are not readily comprehensible, within the context of the case brought, pursuant to section 19 of the Constitution. I agree with the respondents' criticisms that were levelled at some of the declarations sought by the appellant. I endorse their view that many of the proposed declarations, to varying degrees, were unclear, vague, academic, repetitive and unnecessary. They bore no relevance to any issue of constitutionality which was the core issue for the determination of the Full Court. Furthermore, they would not have had the effect of being declaratory of the parties' legal rights inter se, which is the purpose of a

declaration. The simple issue to have been before the Full Court for contemplation would have been whether the impugned provisions of the Regime are inconsistent with the Charter, as alleged, in so far as they relate to attorneys-at-law.

[585] In the interest of limiting an already lengthy judgment, it suffices to say that for the reasons stated above, the Full Court would have been correct to deny the proposed declarations at paragraphs (1),(2),(4),(8),(9) and (10) of the appellant's fixed date claim form. The remaining proposed declarations, even with the necessary modification by the court, would have been sufficient to secure the redress being sought.

[586] Had the Regime been declared null and void in relation to its application to attorneys-at-law, to the extent of its inconsistency with the Charter, it would not have been necessary for a stay of the implementation of the Regime and an injunction to be granted as prayed. Therefore, the fact that these reliefs were not granted is not a factor to be taken into account in determining the accuracy of the order that was made by the Full Court.

[587] Although the appellant's complaint is not fully meritorious as to the orders it ought to have received from the Full Court, it is correct in its contention that the Full Court erred in failing to hold that the Regime is unconstitutional which was the gravamen of the claim.

[588] Ground (a), therefore, succeeds, in part, which is material enough to inform the decision of this court that the appeal be allowed and the decision of the Full Court set aside.

Disposition of the grounds of appeal

[589] The appellant has not succeeded on all the grounds advanced in the appeal or on all the issues. It has, however, managed to successfully establish a substantial number of the grounds that have persuaded me to the viewpoint that on the critical issue of whether the Regime is unconstitutional, it should succeed. For convenience and expediency, the success of the appeal is determined on an issue - by - issue basis in keeping with the way it has been considered. It does not mean that all the grounds that arise within the context of a particular issue have enjoyed the same degree of success. The outcome of the grounds of appeal is as follows:

(a) <u>Issue (i) - succeeds</u>

Whether the Full Court erred in imposing the presumption of constitutionality as the appropriate test in the context of the Charter in determining the constitutionality of the Regime (ground (d)).

(b) <u>Issue (ii) - succeeds</u>

Whether the Full Court wrongly imposed the burden of proof on the appellant, to rebut the presumption that the Regime is constitutional, to the criminal standard of proof, that is, beyond a reasonable doubt (grounds (e) and (f)).

(c) <u>Issue (iii) - fails</u>

Whether the Full Court erred in applying the wrong standard of proof in arriving at its finding that the 1st respondent had proved that the infringement of the appellant's

constitutional rights is reasonably justifiable in a free and democratic society (grounds (aa) and (w)(ii)).

(d) Issue (iv) - succeeds

Whether the Full Court erred in its assessment and findings as to whether the Regime undermines or protects LPP (grounds (g), (h), (i), (j), (k), (l), (m), (n), (p), (r), (w), (x) and (y)).

(e) Issue (v) - succeeds

Whether the Full Court erred in its finding that the Regime does not infringe regulated attorneys-at-law's (and/or) their client's constitutional right to liberty and security of the person (grounds (h) (in part), (t) and (u)).

(f) Issue (vi) - succeeds

Whether the Full Court erred in finding that the examination conducted by the GLC does not amount to "warrantless searches" in breach of the attorney-at-law's constitutional right to protection from search of the person and property (grounds (o), (q), (v) and (w)).

(g) Issue (vii) – succeeds, in part

Whether the Full Court erred in finding that the disclosure, identification, verification and record-keeping requirements of the Regime are within proper limits and do not breach the constitutional rights of regulated attorneys-at-law and their duty of commitment to their client's cause (ground (z)).

(h) Issue (viii) - succeeds

Whether the limitations on, or infringements of Charter rights by the Regime, are demonstrably justified in a free and democratic society (grounds (aa)(i), (bb), (cc) and (w)(ii)).

(i) Issue (ix) - succeeds, in part

Whether the Full Court erred or wrongly exercised its discretion in refusing to grant the orders sought in the fixed date claim form which challenged the constitutionality of the Regime (ground (a)).

The bases for the orders proposed

[590] On the basis of the foregoing, the appellant has succeeded on the appeal, in part, and is entitled to an order setting aside the decision of the Full Court as prayed.

[591] It would also be entitled to a declaration that the Regime has contravened, is contravening, or is likely to contravene the rights guaranteed to attorneys-at-law by sections 13(3)(a) and 13 (3)(j) of the Charter.

[592] For the above reasons, the appellant is entitled to a declaration that some impugned aspects of the Regime, in so far as they relate to regulated attorneys-at-law, are unconstitutional, null and void as being in contravention of the Charter.

[593] It behooves the court to say, in disposing of the appeal, however, that the DFNI Order, by which the Regime has been extended to attorneys-at-law, is not in and of itself unconstitutional, standing alone. Parliament is empowered by the Constitution to

pass laws as it sees fit for the peace, good order and government of the country. The court cannot intrude on that province. Therefore, there is no basis for the court to say, in the circumstances of the case, that the DNFI Order, in itself, is unconstitutional, it being validly passed and not having infringed the Charter. The only thing that the Order has done is to designate attorneys-at-law who carry on certain activities as DNFIs. This does not violate the Charter rights of attorneys-at-law, and so, cannot be declared null and void.

[594] In relation to the amendment to the Legal Profession Act to insert section 5(3C) as well as any regulation(s) made pursuant thereto, including the Legal Professional (Annual Declaration of Activities) Regulations, 2014 although it interferes with the right to privacy of attorneys-at-law it is not unconstitutional. The expectation of privacy of attorneys-at-law in relation to that measure is low as it relates to the regulatory functions of the GLC and is required only for the GLC's internal purpose. Once the offending examination and sharing of information provisons of the Regime are struck down the privacy and liberty rights of attorneys-at-law would not be jeopardised provided there is an order of non-disclosure by the GLC from the court. This provision of the Regime is upheld: **R v McKinlay Transport Ltd**.

[595] What is unconstitutional, for failure to be within the limiting bounds of the Constitution, are some of the various mechanisms of the legislative scheme devised to achieve the legislative objective in relation to attorneys-at-law. These measures are not carefully designed to prevent the infringement of the important Charter rights of privacy

and liberty of attorneys-at-law and/or their clients. More than anything else, there are some provisions of the Regime that have not, sufficiently and effectively, protected LPP, which has not been overridden by Parliament.

[596] Attorneys-at-law engaged in the specified activites listed in the DNFI Order are still designated DNFIs and the GLC remains the competent authority. Section 91A(2)(b) of the POCA does not, by itself, engage the privacy and liberty rights of attorneys-at-law in the absence of the other subsections, which must be struck down. It means that attorneys-at-law would still be bound by aspects of the Regime which do not engage their Charter Rights. The GLC is, therefore, empowered to issue directives and guidance for the benefit of regulated attorneys-at-law, provided that it does not subject them to criminal sanctions for non-compliance.

[597] Accordingly, the parties are at liberty to enter into dialogue to clearly establish those obligations that are to be complied with for the guidance of attorneys-at-law to ensure their compliance with the AML/CFT measures that apply to them in accordance with regulation 5 (1) of the Regulations.

[598] Accordingly, I propose the following declarations, orders and reliefs:

1) The appeal is allowed, in part.

2) The decision of the Full Court made on 4 May 2017 is set aside.

3) The Proceeds of Crime (Designated Non-Financial Institution) (Attorneys-at-Law) Order, 2013 designating attorneys-at-law as non-financial

institutions ("DNFIs") for the purposes of the Proceeds of Crime Act, 2007 is not unconstitutional and is, therefore, valid and lawful.

4) The amendment to the Legal Profession Act to insert section 5(3C) as well as any regulation(s) made pursuant thereto, including the Legal Professional (Annual Declaration of Activities) Regulations, 2014 is not unconstitutional and is, therefore, valid and lawful.

5) The Regime (save and except the provisions of the Regime at paragraphs III and IV above) has contravened, is contravening, or is likely to contravene the following rights guaranteed to attorneys-at-law by the Charter of Fundamental Rights and Freedoms (Amendment) Act, 2011 ("the Charter"):

   i. protection from search of their property in contravention of section 13(3)(j)(i);

   ii. respect for and protection of private life in contravention of section 13(3)(j)(ii);

   iii. protection of privacy of other property and of communication in contravention of section 13(3)(j)(iii); and

   iv. the right to liberty and not to be deprived of liberty in contravention of section 13(3)(a).

6) The following instruments, **in so far as they apply to attorneys-at-law**, are unconstitutional, null and void and of no legal effect, for being inconsistent with sections 13(3)(j) and 13(3)(a) of the the Charter:

i. The Proceeds of Crime Act, 2007 (as amended by the Proceeds of Crime (Amendment) Acts, 2013 and 2019, ("the POCA"), section 91A(2) (save and except 91A(2)(b)); 91A(5); 94(2) and 95, in so far as it requires attorneys-at-law to report suspicious transactions directly to the designated authority, namely, the Chief Technical Director of the Financial Investigation Division ("the FID").

ii. The provisions of the Proceeds of Crime (Money Laundering Prevention) Regulations, 2007 ("the Regulations") and the amendments to it that touch and concern the enforcement of the provisions of the Regime as set out at paragraph VI(i)of this order and any other penalty provisions.

iii. The Legal Profession (Canons of Professional Ethics)(Amendment) Rules, 2014 that amend the Legal Profession (Canons of Professional Ethics) Rules, 1978 ("the Canons") to permit attorneys-at-law to reveal client confidences or secrets in compliance with the POCA and the attendant Regulations.

iv. The provisions of the General Legal Council of Jamaica: Anti-Money Laundering Guidance for the Legal Profession, published in the

Jamaica Gazette Extraordinary of Thursday, 22 May 2014, No 223A ("the GLC Guidance") that are designed to enforce the provisions of the Regime set out at paragraph VI(i) of this order.

7) In respect of the annual declaration of activities by attorneys-at-law filed pursuant to section 5(3C) of the Legal Profession Act, the General Legal Council shall not make any disclosure of any information contained therein.

8) Injunctive relief denied.

9) There shall be no order as to costs, unless within 14 days from the date of this order, written submissions are filed and served by the parties for the court to make an order as to costs after a consideration of the matter on paper.

10) There shall be liberty to apply to give effect to this order.

F WILLIAMS JA

[599] I have read, in draft, the judgment of my learned sister McDonald-Bishop JA. I agree with her reasoning, conclusion and the orders proposed and have nothing to add.

STRAW JA (AG)

[600] I too have read in draft the judgment of my learned sister, McDonald-Bishop JA, and agree with her reasoning, conclusion as well as the proposed orders. I would just add some brief remarks of my own.

[601] I have no reservation in concluding that the inclusion of attorneys-at-law as part of the group of persons to be regulated for the purposes of the Government's AML/CFT legislative measures, by virtue of the DFNI Order, satisfies a legitimate aim and is an important aspect of the global response to the threat posed by money laundering and terrorism financing. The objectives for doing so, are indeed, pressing and substantial.

[602] However, it is readily apparent, as demonstrated in the extensive analysis of my learned sister McDonald-Bishop JA, that the Regime, as it applies to attorneys-at-law, cannot be considered to create a minimal impairment on their Charter rights so as to be demonstrably justified in a free and democratic society.

[603] This is so and indeed must be so, as regulated attorneys-at-law, even when participating in the specified transactions set out in the DFNI Order, may still be engaged in the peculiar function of representing clients within a framework of activities intertwined with attorney-at-law/client privilege, as well as within expected bounds of confidentiality.

[604] It cannot be overlooked or ignored that attorneys-at law do serve a crucial function in the legal system, representing individuals in order to ensure that they are able to access the rights and privileges that the law provides. This peculiar function of attorneys-at-law "attaches particular weight" to the risk of impingement on the attorney-at-law's right to professional secrecy "since it may have repercussions on the proper administration of justice".

[605] The measures that are prescribed, therefore, for the regulation of attorneys-at law, must carefully disentangle the tentacles of any potential criminal activity from their lawful interaction with clients. Those measures must, just as carefully, monitor the dissemination and use of any such information obtained from that interaction in a manner that is proportionate, having regard to their peculiar role in a free and democratic society. Nothing more and nothing less than that standard is required from the Legislature, who are duty bound to establish that any abrogation of Charter rights can be demonstrably justified in a free and democratic society.

MCDONALD-BISHOP JA

ORDER

It is **DECLARED AND ORDERED** that:

1) The appeal is allowed, in part.

2) The decision of the Full Court made on 4 May 2017 is set aside.

3) The Proceeds of Crime (Designated Non-Financial Institution) (Attorneys-at-Law) Order, 2013 designating attorneys-at-law as non-financial institutions ("DNFIs") for the purposes of the Proceeds of Crime Act, 2007 is not unconstitutional and is, therefore, valid and lawful.

4) The amendment to the Legal Profession Act to insert section 5(3C) as well as any regulation(s) made pursuant thereto, including the Legal

Professional (Annual Declaration of Activities) Regulations, 2014 is not unconstitutional and is, therefore, valid and lawful.

5) The Regime (save and except the provisions of the Regime at paragraphs 3) and 4) above) has contravened, is contravening, or is likely to contravene the following rights guaranteed to attorneys-at-law by the Charter of Fundamental Rights and Freedoms (Amendment) Act, 2011 ("the Charter"):

   i. protection from search of their property in contravention of section 13(3)(j)(i);

   ii. respect for and protection of private life in contravention of section 13(3)(j)(ii);

   iii. protection of privacy of other property and of communication in contravention of section 13(3)(j)(iii); and

   iv. the right to liberty and not to be deprived of liberty in contravention of section 13(3)(a).

6) The following instruments, **in so far as they apply to attorneys-at-law**, are unconstitutional, null and void and of no legal effect, for being inconsistent with sections 13(3)(j) and 13(3)(a) of the the Charter:

i. The Proceeds of Crime Act, 2007 (as amended by the Proceeds of Crime (Amendment) Acts, 2013 and 2019, ("the POCA"), section 91A(2) (save and except 91A(2)(b)); 91A(5); 94(2) and 95, in so far as it requires attorneys-at-law to report suspicious transactions directly to the designated authority, namely, the Chief Technical Director of the Financial Investigation Division ("the FID").

ii. The provisions of the Proceeds of Crime (Money Laundering Prevention) Regulations, 2007 ("the Regulations") and the amendments to it that touch and concern the enforcement of the provisions of the Regime as set out at paragraph 6(i) of this order and any other penalty provisions.

iii. The Legal Profession (Canons of Professional Ethics)(Amendment) Rules, 2014 that amend the Legal Profession (Canons of Professional Ethics) Rules, 1978 ("the Canons") to permit attorneys-at-law to reveal client confidences or secrets in compliance with the POCA and the attendant Regulations.

iv. The provisions of the General Legal Council of Jamaica: Anti-Money Laundering Guidance for the Legal Profession, published in the Jamaica Gazette Extraordinary of Thursday, 22 May 2014, No 22[3]A ("the GLC Guidance") that are designed to enforce the provisions of the Regime set out at paragraph 6(i) of this order.

7) In respect of the annual declaration of activities by attorneys-at-law filed pursuant to section 5(3C) of the Legal Profession Act, the General Legal Council shall not make any disclosure of any information contained therein.

8) Injunctive relief denied.

9) There shall be no order as to costs, unless within 14 days from the date of this order, written submissions are filed and served by the parties for the court to make an order as to costs after a consideration of the matter on paper.

10) There shall be liberty to apply to give effect to this order.