Is Canada particularly vulnerable for misuse in money laundering and terrorist financing risks: Especially from Lawyers.

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Introduction

In September 2016, the Financial Action Task Force ('FATF') released its Mutual Evaluation Report[1], which warned Canadians about the threat against, 'major financial institutions and some unscrupulous real estate lawyers' which are targeted by criminals and terrorists involved in laundering money. Specifically, FATF mentioned that Canada has not done enough to combat these type of crimes, and that tools of this type of laundering include lawyers and other professionals. Canada was a founding member of the Paris based FATF, which is now the international organization which moderates and evaluates money laundering worldwide. Canada received an eleven from forty (11/40) evaluation in terms of compliances.

Money laundering is the process which is used to mask the source of money or other assets which have been obtained or brokered from criminal activity. Strictly defined, money laundering is an offence under Section 462.31 of the Canadian Criminal Code[2]. There are typically three stages of money laundering. Placement, the time in which the criminal proceeds first enter the financial system. Layering, the concealment of the criminal origins of proceeds by distancing the funds from their illegal origins. And lastly, integration, the funds are cleansed and appear legitimate for use[3].

[1] Anti-money laundering and counter-terrorist financing measures, Canada, Mutual Evaluation Report, September 2016, FATF, Paris, France, http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Canada-2016.pdf
[2] R.S.C. 1985, c. C-46, as amended
[3] Ellyn, S. (2016). Anti-Money Laundering and Anti-Terrorist Financing [Powerpoint Slides]. Retrieved from https://courses.osgoode.yorku.ca/course/view.php?id=1774.

Compliance with Anti-Money Laundering Legislations

The Financial Transactions Reports Analysis Centre of Canada ('FINTRAC') is the organization which gathers, analyzes, assesses and discloses financial intelligence in Canada. It was originally established in July 2000 to counter suspected money laundering, and was expanded in December 2001 to assist with terrorist financing in Canada.

Even though FINTRAC was established as an agency to implement the anti-money laundering ('AML') regime, it does not have the capabilities to carry out its mandate on its own, and requires reporting entities (private sector actors) to process financial information. This obligation transfers a government responsibility onto corporations and creates a principal-agent duty between the public and private sector. This reminds the critical reviewer of the conflict of corporate social responsibility: and the question of whether this arrangement, in light of the need for private institutions to balance contradictory incentives is possible given the interest of the corporate sphere to generate profit, and the public interest.

To comply with the PCMLTFA[4], the governing act, reporting entities must set up internal compliance policies and procedures to properly identify users, monitor their financial information, and report suspected crimes to FINTRAC. The reporters, entities such as accountants, institutions, casinos, securities dealers, real estate brokers, precious gem dealers, life insurance and money services businesses, acquire a legal duty to submit suspicious and other proscribed financial transaction reports to FINTRAC. These institutions are required to report not only certain cash dealings but also suspicious ones, and they must develop their rules for establishing what qualifies as a suspicion, part of the 'risk-based' approach. Failure to report suspicious transactions can bring

[4] S.C. 2000, c.17. ('PCMLTFA')

about criminal penalties of up to fines of $2 million or 5 years of imprisonment.[5] In addition, firms and institutions that send in reports to the financial institution unit ('FIU') are forbidden from letting the customer know that a report has been lodged. In Canada, the criminal penalty for disclosing to a customer that a suspicious transaction has been submitted to FINTRAC is up to 2 years imprisonment. These regulations and lack of disclosure are part of the large problem that existed when FINTRAC was envisioned to be equally applied to lawyers.

The primary intake outlets, the bankers, accountants and insurance brokers, have been mandated a sensitive legal duty that requires being informed, monitoring and identifying their client's financial locale and in case of suspected money laundering or terrorist financing, report to FINTRAC. This supervision responsibility, of reporting on customers changes, the nature of the relationship between client and service-provider. It creates a type of big-brother phenomena which FATF states is not enough to accurately control high level money laundering.

The goal is to prevent the financial system from being used as a conduit for criminal proceeds.[6] Customer-due-diligence procedures, created by the Basel Committee to further improve customer identification standards[7], called for proactive account monitoring by banks for suspicious activities and high risk customer oversight[8]. In practicality, the concept behind the rules extend beyond financial institutions and mandate that all reporting entities establish and record the identity of their clients. Similarly, customer due diligence directives are meant to ensure that these reporters establish details about their clients such as address, occupation, beneficiary of the funds and relationship with the originator of the transaction. With the introduction of FATF 9 Special

[5] FINTRAC. (2011). Annual Report 2011. Ottawa: Financial Transactions and Reports Analysis Centre of Canada.
[6] Basel Committee on Banking Supervision. (2001). Customer due diligence for banks.
[7] *Ibid.*
[8] *Ibid.*

Recommendations[9] to prevent the financing of terrorism, clients have to be verified against lists of known terrorists. The same AML apparatus which was to be originally employed by financial institutions and other money-handling businesses in the private sector bound by these rules, but they now had to stay alert and evaluate the potential that their clients' terrorist intentions and report on it, or risk penalties[10]. In Canada the PCMLTFA brought on new provisions that call for the submission of a suspicious transaction report (STR), when there are grounds to suspect that transfers of funds are related to the commission of terrorist activities[11]. With the creation of compliance measures, institutions were instructed by the government regulator to perform a vigilance function and monitor customers' financial patterns. This information would potentially force parties to terminate or refuse business relations with customers. The compliance regulations financial institutions as strainers, which places a burden on them to eaves-drop on their clients[12]; this is a burden compliance officers feel that governments have unloaded onto them while providing little or no compensation[13]. Outside of Canada, there is similar sentiment. In Belgium, 77 per cent of interviewed compliance officers in financial institutions felt that the government saddled the banking sector with governmental tasks[14]. In France, compliance officers thought that delegating this responsibility constituted 'the ultimate alibi for governmental powerlessness' as well as 'politicians who don't really intend to join in the fight' [15]. These answers indicate that by

[9] FATF IX Special Recommendations, February 2008, accessed at http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf
[10] Sharman, J. (2011b). The Money Laundry: Regulating Criminal Finance in the Global Economy. Ithaca: Cornell University Press.
[11] FINTRAC. (2010). Annual Report 2010. Ten Years of Connecting the Money to the Crime. Financial Transactions and Reports Analysis Centre of Canada.
[12] Chong, A., & López-de-Silanes, F. (2007). Money Laundering and its Regulation. Washington DC: Inter-American Development Bank.
[13] Favarel-Garrigues, G., Godefroy, T., & Lascoumes, P. (2008). Sentinels in the Banking Industry. Private Actors and the Fight against Money Laundering in France. British Journal of Criminology, 48(1), 1-19.
[14] Verhage, A. (2011). The Anti Money Laundering Complex and the Compliance Industry. Routledge Studies in Crime and Economics.
[15] Supra Note 8, Page 17.

delegating this responsibility to private institutions governments may not have suitably considered the risk and juxtaposition that officials acting in a dual role of both bankers and investigators, would bring. While some compliance officers admitted that monitoring to this degree could only be performed by banks[16], others felt required to take on a job they consider extraneous to their profession[17] putting their careers into question. This is not unlike other professions which have criminal and other ethical responsibilities which supersede their obligations to their clients (ie. Psychiatrists etc.)

The AML compliance for private-sector enterprises that are under reporting duties generates a conflict of interest. The FATF Recommendations call for lawyers and law professionals that carry out transactions on behalf of their clients to be included in the list of private sector actors with reporting obligations. FATF views them as potential custodians or navigators of money laundering and terrorist financing efforts due to the type of services they provide[18] lawyers were seen as frequent actors in complex money laundering schemes. The Canadian legislation first included law professionals in its list of reporting entities, alongside bankers and accountants.[19] But the problems that this encompassed are vast and will be addressed later in this paper.

Similar problems apply to lawyers as to other professionals that are under reporting obligations to the authorities. The AML regime has delegated to financial and non-financial institutions the duty to protect the financial system, under a threat of criminal prosecution and at a high cost and with

[16] Supra Note 9.
[17] Supra Note 8.
[18] FATF. (2001). Report on Money Laundering Typologies 2000-2001. FATF.
[19] Canada, S.C. 2000, c. 17.

little compensation[20]. But their primary business interest is profit, which entails maintaining and cultivating the trust of their customers, yet the AML compliance obligation requires them to violate this trust, and not to advise the clients. Private actors are being asked to recognize would-be criminals and cases of potential terrorism financing, when there is no 'effective profile for operational terrorists' that they could use: they are being asked to conduct undercover operations daily. There are no clear guidelines as to how to identify characteristics of AML on terrorists, but rather just a list of characters compiled by national and international law enforcement bodies. It becomes a daily challenge to generate evidence reports, especially since the front line officials are not police officers, nor are they trained in law enforcement techniques.[21]

Lack of Anti-Money Laundering Requirements for Lawyers

One of the central comments from FATF, is that Canada is specifically vulnerable to money laundering through lawyers who cannot report it. In Canada, as in the USA, attorneys and lawyers are not subject to anti-money laundering reporting obligations as in other countries. The public policy reason behind this is the solicitor-client confidentiality and privilege, which is a tenant of the Canadian common-law legal system.

However, this also seems counter to the ethics course that every legal student is required to take in law school. Any legal student would know that privilege does not cover advice that is obtained from lawyers for a criminal or fraudulent purpose, or in a case where the advice being given is not legal in nature, but rather is based in business. If the client is attempting to use a

[20] Beare, M. E., & Schneider, S. (2007). Money Laundering In Canada: Chasing Dirty And Dangerous Dollars. Toronto: University of Toronto Press
[21] *Ibid.*

lawyer's trust account to avoid reporting obligations, or attempting to use a lawyer's trust account as a banking facility, there shouldn't be any privilege which attaches.

Further, any legal advice which is given to a person who is not a client would not have immediate privilege. While there is a general obligation to maintain confidentiality, this may not rise to privilege. Lawyers need to report terrorist financing, but why not anti-laundering.

Privilege

Privilege belongs to the client and not to the lawyer or the law firm: a client can waive privilege expressly or by accident (inadvertently) by disclosing otherwise privileged information to a third party (a non-lawyer). But a lawyer can only be forced to reveal privileged information in very specific circumstances or under Court Order.

The law of privilege is that communications received by a lawyer or advice given that is within the ordinary scope of professional employment is protected and its disclosure cannot be compelled in any court of law or equity. The public policy behind this rule is that privilege is necessary for the administration of justice so that clients can confide in experts in jurisprudence in respect of their rights and obligations.

However, any communication or advice that is criminal or intended to further a criminal purpose hurts the interests of justice and cannot be protected by privilege. Such a communication or advice is not within the scope of "professional employment" of a lawyer and cannot be covered by privilege. No lawyer can be in the business of furthering criminality. If a client obtains advice from a lawyer by fraud or deception (does not tell the lawyer the real reason for the advice) and it later emerges that the advice was for a criminal or fraudulent purpose, the advice is not protected by

privilege. While there is privilege which protects communications between a lawyer and a client, it disappears if the relationship is abused. A client who consults a lawyer for advice for the commission of fraud or for criminality, "will get no help from the law. He must let the truth be told."[22] The Supreme Court of Canada has held that "communication made in order to facilitate the commission of a crime or fraud will not be confidential, regardless of whether or not the lawyer is acting in good faith."[23]

For AML reporting purposes, if the communication or advice is in respect of criminality or fraud by the client, whether or not the lawyer is aware of it, no privilege attaches to the advice or communication. So, if the lawyer suspects that a financial transaction involves money laundering, that appears to fall within the exception to privilege and ergo, privilege becomes irrelevant since no privilege would attach to advice given in furtherance of a money laundering financial transaction.

Canadian Jurisprudence

In early 2015, the Supreme Court of Canada came down with a landmark decision which supported lawyer-client privilege, and protected the rights of clients from government. In the months following the 9/11 terrorist attacks, the Liberal government passed anti terrorist legislation which brought lawyers under the spectrum of reporting obligations against their clients.

The law required lawyers and other financial professional who move money to keep records of the transactions, verify identities, and establish internal programs to ensure that no money laundering occurs. Lawyers were included from November 2001 at the outset of the legislation. Section 488.1

[22] Clark v. US, 289 U.S. 1 (15) (1933)
[23] Juman v. Doucette, [2008] 1 SCR 157, 2008 SCC 8 (CanLII)

of the Criminal Code (Canada) was used as authority to mandate searching and reporting to FINTRAC.

The SCC's decision in *Canada (AG) v. Federation of Law Society of Canada* struck down section 488.1 of the Criminal Code (Canada) as unconstitutional since the section allowed for searches of lawyer's offices without adequate protection. The Court found unanimously that the Federation argument was correct, and subsequently, five members of the Court found that a lawyer's duty of commitment to its clients was a "principal of fundamental justice," and that requiring a lawyer to report on their client's activity would violate that principle. The Court stated that the government cannot impose duties on lawyer that undermine the duty of commitment to their clients. The law never actually took effect over lawyers as the Federations of Law Societies in various provincial jurisdictions obtained injunctions almost immediately after it was passed.

The Court left open the possibility that similar, though less onerous requirements might comply with the provisions of the Charter[24]. However, until the government passes new legislation, lawyers do not have to keep records under the PCMLTFA [25]. However, this does not mean that lawyers are free from financial record-keeping obligations. Provincial law societies have their own record keeping requirements (Ontario's is set out in Law Society of Upper Canada's Bylaw 9)[26] and lawyers must still comply with these requirements. As previously mentioned, it is a crime for lawyers to aid, abet, or act as an accessory to money laundering or terrorist financing and so lawyers must avoid being drawn into such schemes under the Criminal Code (Canada). Lawyers

[24] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[25] S.C. 2000, c.17.
[26] *Rules of Professional Conduct,* (Toronto: Law Society of Upper Canada)

in Ontario (and other provinces) have significant ethical obligations to ensure they are not unwitting dupes to illegal financial transactions. Lawyers are generally permitted to receive no more than $7,500 in cash from a client except to pay the lawyer's fees, disbursements or fines. Any refunds from cash receipts must be made to the client in cash to avoid the risk of laundering. Rule 3.2-7 and 7.1 require lawyers to be vigilant against being used by clients as a tool for criminal activity. The Commentary on these Rules includes a list of "red flags" in real estate transactions that should trigger a lawyer's obligation to be cautious about a given transaction.

In its decision, the SCC avoided the question of whether financial records are protected by solicitor-client privilege. To that point, appellate courts had been inconsistent on this point. The issue was then before the Supreme Court of Canada last year in *Minister of National Revenue v. Thomson*[27]. In *Thomson*, and its companion case *Chambre des notaires*, the SCC established that the violation of solicitor-client privilege by the Canada Revenue Agency, was not minimal, and was only to be completed on a very strict basis. The Court in *Thomson* ruled that the request to disclose the name and financial documents of a lawyer violated his solicitor-client privilege, and the reasoning for the request was not sufficient to warrant this type of request. However, solicitor-client communications designed to facilitate the commission of a crime or fraud are not privileged regardless of whether the lawyer is a dupe or willing participant in the crime.[28]

In the companion case, the *Attorney General of Canada, Canada Revenue Agency v. Chambre des notaires du Québec, Barreau du Québec*[29], the Supreme Court has had to consider the related

[27] 2016 SCC 21, [2016] 1 S.C.R. 381 ('Thomson')
[28] Solosky v. The Queen, 1979 CanLII 9 (SCC))
[29] 2016 SCC 20, [2016] 1 S.C.R. 336 ('Chambres des Notares')

question of whether the Canada Revenue Agency should be able to access lawyers' financial records under the Income Tax Act[30]. The scheme under the Income Tax Act is somewhat different than under PCMLTFA and it contains its own statutory definition of solicitor-client privilege. Despite these differences, the Court had to return to the broader questions of when lawyers' financial or accounting records are privileged and when they can be demanded by government agencies. The Court found that the impugned provisions are to be read in a very narrow scope: such that this information can only be requested in a very limited scope. The Court required special authorization of a Superior Court Judge (vs. CRA simply demanding the records, or a Justice of the Peace granting the warrant), and the impairment of any solicitor-client confidentiality must be kept to the strictest minimal infringement possible.

European Jurisprudence

To fight money laundering and terrorism, the European Community adopted a Directive (91/308/CE) in 1991, which was amended in 2001 (2001/97/CE) and eventually improved and replaced in 2005 by Directive 2005/60/CE). Under these Directives, "independent legal professionals," have the duty to promptly inform the Financial Intelligence Unit if they "know, suspect or have reasonable grounds to suspect," that money laundering or terrorist financing is being or has been committed or attempted; however, this duty does not apply to all activities directly or indirectly related to their defense tasks (see articles 2, 22 and 23 of the 2005 Directive).

France implemented those Directives by duplicating their provisions in the Monetary and Financial Code (articles from L.561.15 to L.561.22), and prescribing that lawyers not fulfilling their "declaration duties," might be subjected to disciplinary proceeding (article L.561-36 III). On this

[30] R.S.C. 1985, c. 1 (5th Supp.)

basis, in 2007 the French National Council of lawyers (*Conseil National des barreaux*) adopted an internal regulation providing for sanctions, up to the lawyer's disbarment.

That year, the *Conseil d'Etat* was asked to repeal this internal regulation, which allegedly violated articles 7 and 8 of the European Convention on Human Rights. The applicant (a French lawyer)[31] argued that the regulation lacked precision and foreseeability, and infringed the lawyer's right to privacy by imposing a disclosure of strictly confidential information. He also asked the *Conseil d'Etat* to request the European Court of Justice a preliminary ruling on the compliance of the "declaration of suspicion" with Article 6.

On July 23rd, 2010, the *Conseil d'Etat* dismissed the claim by the lawyer, and declared that the regulation was in accordance with the European human rights standards. The decision was appealed to the European Court of Human Rights.

The European Court of Human Rights held, unanimously, that there had been no violation of Article 8 (right to respect for private life) of the European Convention on Human Rights. The case concerned the obligation on French lawyers to report their "suspicions" regarding possible money laundering activities by their clients. Among other things, the applicant submitted that this obligation, conflicted with Article 8 of the Convention, which protects the lawyer-client relationship. The Court stressed the importance of the confidentiality of lawyer-client relations and of legal professional privilege. It considered, however, that the obligation to report suspicions was in pursuit the aim of prevention of crime, since it was intended to combat money laundering and related criminal offences, and that it was necessary in pursuit of that goal. On this point, the Court held that the obligation to report suspicions, as implemented in France, "did not interfere

[31] Michaud v. France (12323/11), ECHR 445 (2012), European Court of Human Rights,

disproportionately with legal professional privilege"[32], since lawyers were not subject to this requirement when defending parties and that the statute had put in place a protection to ensure to the survival of privilege, thus ensuring that lawyers did not submit their reports directly to the authorities, but to the president of their respective Bar association.

This case supplemented an earlier case from 2007, *Ordre des Barreaux Francophones et Germanophones v. Conseil des Ministres*[33] held that advice and assistance given by lawyers in financial and real estate transactions that had no link with judicial proceedings were not exempt from the duty to cooperate in combating money laundering. The Court in this proceeding declared that any lawyer defending a person who was charged with a criminal offence, would be exempt from reporting requirements.

Is AML Working

The current AML establishment is an attempt to tackle a very complex globalized issue. While worldwide there is no real disagreement on the need for AML, establishing the effectiveness of the current regime remains an elusive and unquantifiable goal. Principally, this is because measuring effectiveness presents several limitations: firstly financial crime is inherently an underhanded and obscured activity so it is not easily quantifiable; secondly, the only way to assess the amount of money laundering, is by indirectly observing the seizure/confiscation rates of criminal proceeds; thirdly, fluctuation in money laundering charges and conviction rates can be attributed either to a fluctuation in criminal activity or to changes in law enforcement effort

[32]Press Release: European Court of Human Rights, The Obligation on lawyers to report suspicions in the context of the fight against money laundering did not interfere disproportionately with professional privilege, 06.12.2012, accessed at www.echr.coe.int.
[33] [2007] ECR 1-05305

intensity, or both. When judging on a global scale, it is often difficult to specifically pinpoint what the causes are and what has been successful.[34] In some cases, the simple and most straightforward crimes are easier to locate, whereas funds stolen by the ruling elites of developing countries, millions of dollars in proceeds of corruption and tax evasion, have been accepted and stashed in the west by major banks and financial institutions without major reputational repercussions.

The FATF-based AML/CTF framework in most countries operates on the assumption that if the FATF recommendations are followed, a decrease in financial crime will occur. But most government bodies which enforce AML do not follow the framework, but rather concentrate on following and enforcing the second order technicalities of FATF. If there is no quality control of compliance measures, then the extensive and intrusive AML polices amount to an artificial security: a pretext to create a sense of safety, while not doing much to limit money laundering - or whether they serve as a real deterrent. Critics point out that "AML bodies themselves are peculiarly uninterested in finding out whether the system they administer achieves its fundamental goals."[35] The end goal being that the AML/CTF legislation exists period, and that this fact is a positive gain in and of itself.

Additionally, individuals who work within the system trust its deterrent abilities and do not see the practical value in questioning the policies; meanwhile, outsiders doubt that the AML regime has made a real difference in the underlying crime rates[36]. In more extreme cases, sceptics simply concede that "most literature on money laundering effects is pure speculation" [37]. So far

[34] Sharman, J. (2011b). The Money Laundry: Regulating Criminal Finance in the Global Economy. Ithaca: Cornell University Press.
[35] *Ibid.*
[36] Supra Note 25.
[37] Unger, B., Rawlings, G., Siegel, M., Ferwerda, J., de Kruijf, W., Busuioc, M., et al. (2006). The Amounts and the Effects of Money Laundering. Report for the Dutch Ministry of Finance. Utrecht School of Economics, Utrecht.

there has been no comprehensive attempt to evaluate how well the AML measures hold up in the Canadian framework. The ten-year evaluation of the Canadian AML/CTF regime undertaken for the Department of Finance in 2010 mentions the effectiveness of the system only incidentally. The report carefully mentions that the system "likely contributed to the creation of an environment that is hostile to ML/TF and/or that has been effective in deterring ML/TF and that has reduced the profitability of crime and the likelihood of terrorist activities.[38]" Officials surveyed for the Evaluation opined that Canada's policies made ML/FT significantly more difficult, as evidenced by reports of criminals' growing complexity in attempting to avoid suspicious transactions reporting requirements.[39] An audit of FINTRAC by the Canadian Office of the Privacy Commissioner only assessed the processes and practices for managing and protecting personal information but did not evaluate the effectiveness of the regime[40].

The lack of an evaluation of whether the AML system achieves what it was meant to achieve is odd. There is no built-in system to evaluate progress. Additionally, evidence of evaluations of reporting entities' compliance measures, seems to focus on the what exists from implementation; any evidentiary measure of quality control seems to be non-existent. In Canada, FINTRAC is mandated to ensure compliance, enforcement and performance investigation of reporting entities and the agency conducts a series of performance audits, 'examinations', every year. It is the sole organization that does these audits which determine if the entity is meeting its obligations under the legislation and as the agency's annual report states, the focus of examinations

[38] Canada, Department of Finance. (2010). 10-Year Evaluation of Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime. Final Evaluation Report. presented by Capra International Inc.
[39] *Ibid.*
[40] Office of the Privacy Commissioner of Canada. (2009). Audit of the Financial Transactions and Reports Analysis Centre of Canada. Ottawa.

is "on large entities and high-risk sectors."[41] FATF's report criticizes the effect of these examinations.

The content of these examinations is not published; however, the 2007 FINTRAC report provided some insight in the types of irregularities found among the entities audited. At the time, 29 per cent of irregularities uncovered concerned the entity's overall compliance regime, 24 percent of deficiencies had to do with failures to ascertain clients' identities and 18 percent were related transaction reporting. The report stated that many of the reporting entities wanted to comply with the legislation and only those persistently non-compliant entities were reported to law enforcement authorities.[42] This restricted information only allows readers to speculate about the level of compliance control that the public regulator employs. If private sector agents can get away with a 'superficial' compliance to which they may not be honestly committed by claiming, for example, that they intended to comply, then they could, realistically, get away with brash AML irregularities. This suggests that private sector entities subject to AML have in fact more leeway to pursue their own interest than the government that set it up had hoped for, which constitutes a real vulnerability of the AML entities. This type of superficial reporting leads one to questions how FATF can criticize the reporting, and give Canada such a low grade, yet put forward these remedies which are not perfected.

One approach at testing effectiveness has been to look at the enforcement and the number of money-laundering offences. Statistics Canada[43] compiled the number of money laundering

[41] Supra, Note 3.
[42] FINTRAC. (2007). Annual Report 2007. Financial Transaction and Reports Analysis Centre of Canada.
[43] Brennan, S., & Vaillancourt, R. (2009). Money laundering in Canada, 2009. Ottawa: Statistics Canada.

incidents over the past 10 years. Money laundering reported by police increased substantially in the period 2004 to 2006 and then remained relatively stable after 2006 on. This is positive.

The dramatic increase in that two year period has been attributed to a shift in legislative focus along with national and international initiatives aimed at addressing money laundering.[44] This stagnation after 2006 is more difficult to explain; it may well be a sign that ML has not increased in recent years, or that AML measures implemented in recent years have not truly reduced the incidence of the crime. One could even infer that law enforcement has kept the pace of ML advances. This example perfectly illustrates the difficulties in objectively evaluating the current AML/CTF regime's success and effects on the incidence of money laundering. Likely, the Canadian system of AML reporting has simply continued to increase. The numbers will likely continue to fluctuate in perpetuity, even if the criminals move more underground or if there is more or less reporting (requirements).

Conclusion: Is FATF Correct in asserting that Canada should have regulation of lawyers

This paper has evaluated the social policy reasoning behind the need for solicitor-client privilege, and the reasoning that the Canadian Supreme Court has not given for requiring lawyers to report on their clients to the government. It has further touched on other jurisdictions and how they have applied similar reporting requirements on their legal community. Overall, Canada is a member of FATF, and has been since the start. Further, Canada, and its individual Provinces, have sought to ensure that it complies with AML and CTF legislation to the best of its ability. But, this is an evolving area of law and one that is still not correct.

[44] *Ibid.*

The public policy reasons behind lawyer-client privilege goes back hundreds of years. It is the bedrock of the judicial system, and one that cannot simply be impugned. There are enough rights and responsibilities which have been attributed to Terrorism, and crime, but this is where the buck must stop.

The principle that Canada was founded on was Peace, Order and Good Government[45]. This was supplemented in 1982 by the Charter of Rights and Freedoms[46], which at Section 10 specifically guarantees the rights to legal counsel. All of this together is the foundation for the free, democratic society Canadian's live in. We should not have to look behind every corner, and fear that every single transaction is being reported. However, just as in the Charter (Section 1), certain rules are required in a free and democratic society. But violating the sanctity of the lawyer-client relationship, is simply not tolerable. The evidence that has been put forward in this paper is that it is unlikely that even if lawyers were required to report against their clients, that there would be any increase in the amount of AML and CTF reported: however, there would be a destruction of the bedrock of the judicial system. It is clear that the Supreme Court Decision was proper, and should be maintained at all costs.

While FATF does not believe that Canada has reached anywhere close to the security measures that it could be to secure AML or CTF, namely in part to the legal profession, it is interesting to note that lawyers in Europe, which have been influence by the Civil Legal System and the role of the lawyer, may make a difference.

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45 The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11

46 Supra, Note 12.

FATF needs to recognize the role that the lawyer plays in the Canadian jurdicial system, and to respect privilege as a tenant.

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