



Court of Appeal Ruling a Blow to Jamaica's Money Laundering Fight

In February 2020, the Financial Action Task Force (FATF), the global standard setting body for Anti-Money Laundering and the Counter Financing of Terrorism (AML/CFT), named Jamaica among its list of high risk countries, with strategic deficiencies in its AML/CFT regime. Of note, one area of concern from among the six areas identified by the FATF indicated that Jamaica needed to work to improve, in keeping with its high level commitment *"including all Financial Institutions and DNFBPs in the AML/CFT regime and ensuring adequate risk based supervision in all sectors."*

Designated Non-Financial Businesses and Professionals (DNFBP) are those entities which are not financial institutions but who are prescribed to be captured by AML/CFT laws, in keeping with their susceptibility to facilitating money laundering. DNFBPs include lawyers, accountants, realtors and dealers in precious metals. In light of Jamaica's current designation by the FATF, the recent ruling by Jamaica's Court of Appeal which determined the unconstitutionality of lawyers reporting suspicious activity of their clients to the Financial Investigation Division (FID), among other provisions, is a blow to and further jeopardizes Jamaica's removal from the FATF's list of countries with strategic deficiencies in the medium to long term.

Recommendation 23 of the FATF's 40 Recommendations which countries are expected to implement, and are subsequently evaluated against through the Mutual Evaluation process, specifies that "lawyers, notaries, other independent legal professionals and accountants" are expected to "report suspicious transactions when, on behalf of or for a client," they handle financial transactions which include: "buying and selling real estate, managing client funds or buying and selling of business entities." Therefore, Jamaica's legal AML/CFT framework must require lawyers to report on the suspicious activities of their clients. If not, Jamaica risks continued exposure in the international community in relation to its AML/CFT regime.

A win for Attorney Client Privilege

As reported in the Gleaner on May 11, 2017, "Lawyers taking POCA fight to Appeal", "The JBA claimed that the amended legislation would damage the rights of citizens to an independent legal profession. One of the declarations sought was that the duty imposed on attorneys-at-law to report suspicious transactions, which are not defined in the regime, would be in breach of their duty to their clients and the principle of confidentiality in the relationship of attorney and client and amounted to a conflict of interest." A review of FATF's interpretive notes on Recommendation 23 acknowledges the professional secrecy and legal professional privilege afforded to lawyers. Its states "Lawyers, notaries, other independent legal professionals, and accountants acting as independent legal professionals, are not required to report suspicious transactions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege."

The Court of Appeal in ruling that the 2013 amendments to Jamaica's Proceeds of Crime Act (POCA) which required lawyers to report suspicious activity of their clients is unconstitutional, restores, unless successfully challenged at the Privy Council, the client attorney relationship and the confidence which underpins its functioning in keeping with our constitutional arrangements.

Alternate Viewpoint



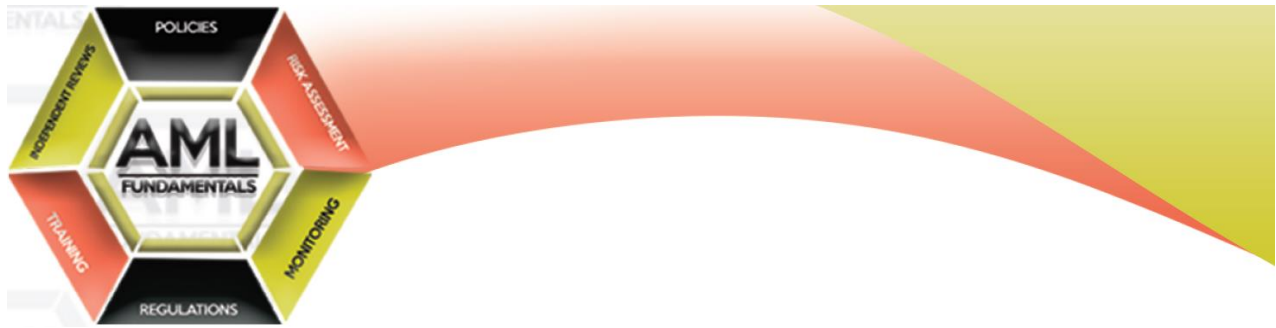
Jamaica's jurisprudence mirrors that of the United Kingdom (UK), Common Law. Lawyers in the UK have been subjected to reporting requirements under their POCA legislation for the past 15 years. Writing for the Global Anticorruption Blog, Hilary Hurd in her article entitled "Applying Anti-Money Laundering Reporting Obligations on Lawyers: The UK Experience", explored whether POCA undermined the traditional duties that lawyers owed their clients. The article indicated that "the UK created some flexibility in the reporting obligations as to protect certain areas of attorney-client confidentiality. UK Lawyers are not obligated to file STRs based on information that would fall under attorney-client privilege or advice privilege, as well as having reasonable excuse for non-disclosure." Ms. Hurd's reporting captured the views of attorneys whose work closely aligned with the UK's POCA. She reported that there appeared to be a consensus that POCA did not undermine the traditional duties of lawyers. In the UK's context, it was indicated that "the areas of attorney-client confidentiality that POCA preserves are significant and largely sufficient." Highlighted also was the view of a culture shift in how British lawyers perceived their responsibility. The article records, "another lawyer I spoke with emphasized how, while everyone was initially up in arms about POCA, there is now more rhetoric that lawyers need to act with broader public interest in mind."

It is instructive that the view expressed from Ms. Hurd's article, appears to mirror sentiments carried in the ruling of Jamaica's Constitutional Court when it initially heard the matter. The Court ruled that "In light of the circumstances contemplated by the regime, the legitimate duties of attorneys to their clients are not compromised", further "The regime includes sufficient safeguards to ensure only minimal impairment of these rights occasioned in the pursuit of these undoubtedly important objectives. Accordingly, even those aspects of the regime which affect privacy rights are demonstrably justified in a free and democratic society."

What next?

The importance and significance of constitutional rights in a democratic society cannot be understated or taken for granted. However, if we consider the impact of crime and violence, no doubt influenced by corruption and money laundering within the Jamaican society, we might be forced to consider if the regime which POCA sought to implement, as supported by the earlier ruling of the Constitutional Court, is demonstrable justifiable in the fight against criminality and its impact on the Jamaican state. If we take the UK's experience as referenced, while not all encompassing, we see that it is possible for the provisions envisioned to work. The FATF's interpretive notes for Recommendation 23 further indicate, "It is for each country to determine the matters that would fall under legal professional privilege or professional secrecy. This would normally cover information lawyers, notaries or other independent legal professionals receive from or obtain through one of their clients: (a) in the course of ascertaining the legal position of their client, or (b) in performing their task of defending or representing that client in, or concerning judicial, administrative, arbitration or mediation proceedings." The 2013 Amendments to Jamaica's POCA at Section 91A(3) appears to have followed the FATF's interpretive notes by the provision that "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."

Maybe some perspective can be had from "Straw JA (AG)" in her remarks included in the ruling of the Court of Appeal at paragraph 601 which states, "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."



In light of Jamaica's international obligation to implement the FATF recommendations, and due to the consequences which could flow from non-compliance for our financial and economic wellbeing, the government may have little choice but to seek leave to appeal the decision at the Judicial Committee of the Privy Council. Outside of this course of action, the need arises for the Parliament to pursue constitutional reform which strikes a balance for the rights of citizens to be upheld, without impeding the implementation of legal regimes which seeks to further the rule of law within the Jamaican society.

It is therefore left for the Government of Jamaica to maneuver the existing entanglements in law constitutionally, which prevents Jamaica's compliance with Recommendation 23. As put by Straw JA, "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."

Fabian E. Sanchez, JP
MBA, BBA, CAMS, CIRM, Int. Dip. AML

