



S-236280

No.  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

**FEDERATION OF LAW SOCIETIES OF CANADA**

PETITIONER

AND

**ATTORNEY GENERAL OF CANADA**

RESPONDENT

**PETITION TO THE COURT**

**ON NOTICE TO: The Attorney General of Canada**

**Office of the Deputy Attorney General of  
Canada  
284 Wellington Street  
Ottawa, Ontario K1A 0H8**

**British Columbia Regional Office  
Department of Justice Canada  
900 - 840 Howe Street  
Vancouver, British Columbia V6Z 2S9**

**Attention: Loretta Chun**

**This proceeding is brought for the relief set out in Part 1 below by,**

[X] the Federation of Law Societies of Canada (the "**Federation**" or the "**Petitioner**")

If you intend to respond to this petition, you or your lawyer must

(a) file a Response to Petition in Form 67 in the above-named Registry of this Court within the time for Response to Petition described below, and

(b) serve on the Petitioner

(i) 2 copies of the filed Response to Petition, and

(ii) 2 copies of each filed Affidavit on which you intend to rely at the hearing

**Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the Response to Petition within the time for response.**

**Time for Response To Petition**

A Response to Petition must be filed and served on the Petitioner,

- (a) if you were served with the Petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the Petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the Petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: 800 Smithe Street, Vancouver, BC V6Z 2E1
(2)	<p>The ADDRESS FOR SERVICE of the Petitioner is:</p> <p>Blake, Cassels &amp; Graydon LLP Barristers and Solicitors 1133 Melville Street Suite 3500, The Stack Vancouver, BC V6E 4E5 Attention: Roy W. Millen / Claire Hildebrand / Patrick Palmer</p>
	<p>Fax number address for service (if any) of the Petitioner:</p> <p>N/A</p>
	<p>E-mail address for service (if any) of the Petitioner:</p> <p>Vancouver.service@blakes.com; roy.millen@blakes.com.; claire.hildebrand@blakes.com; patrick.palmer@blakes.com</p>
(3)	<p>The name and office address of the Petitioner's lawyer is:</p> <p>Blake, Cassels &amp; Graydon LLP Barristers and Solicitors 1133 Melville Street Suite 3500, The Stack Vancouver, BC V6E 4E5 Attention: Roy W. Millen / Claire Hildebrand / Patrick Palmer</p>

## CLAIM OF THE PETITIONER

### Part 1: ORDERS SOUGHT

1. A declaration that sections 237.3 and 237.4 of the *Income Tax Act*, R.S.C. 1985, c. 1 (the “ITA”) are inconsistent with the Constitution of Canada, and of no force or effect, to the extent that those sections apply to legal professionals.
2. A declaration that the term “advisor” as it is used in sections 237.3 and 237.4 of the ITA be read down so as to exclude legal professionals.
3. An order for interim and interlocutory relief suspending the operation of sections 237.3 and 237.4 of the ITA with respect to legal professionals until the hearing of this petition and the release of this court’s decision thereon.
4. Costs.

### Part 2: FACTUAL BASIS

#### ***Background: The Federation of Law Societies of Canada***

5. This petition is brought by the Federation, a federal not-for-profit corporation governed by the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23. The Federation is the national association of 14 provincial and territorial bodies governing the legal profession in Canada (including Quebec notaries and Ontario paralegals).
6. Each of the Federation’s member law societies have a statutory mandate to regulate the legal profession in the public interest. As the national association of these law societies, the Federation’s mission is also to serve the public interest, in particular by strengthening Canada’s system of governance of an independent legal profession, reinforcing public confidence in the legal professions, and making Canada a leading example for justice systems globally.

#### ***Background: Mandatory Disclosure of Reportable Transactions under the ITA***

7. In 2013, Parliament adopted legislation adding section 237.3 to the ITA. Section 237.3 established a mandatory reporting regime with respect to “reportable transactions” (the “**Old Legislation**”).

8. “Reportable transactions” are a type of “avoidance transaction” under section 245 of the ITA, commonly referred to as the “General Anti-Avoidance Rule” (“**GAAR**”). At a high level, avoidance transactions (and therefore reportable transactions) are transactions undertaken primarily for a tax benefit, which the GAAR discourages.

9. Under the Old Legislation, if an avoidance transaction met certain statutory hallmarks, it was considered a reportable transaction for the purpose of the ITA. Any person who derived a tax benefit from a reportable transaction was required to disclose the transaction to the Canada Revenue Agency (the “**CRA**”) by filing an information return.

10. For the purpose of this mandatory disclosure scheme, a reportable transaction was defined as an “avoidance transaction that is entered into by or for the benefit of a person, and each transaction that is part of a series of transactions that includes the avoidance transaction” if any two of the following three “hallmarks” applied to that transaction:

- (a) Fee: A fee related to the tax benefit that results from the avoidance transaction is payable to either an “advisor” or a “promoter”.

Advisors include any person who provides any advice or assistance in respect of developing or implementing the transaction. Promoters include any person who promotes any arrangement or scheme that relates to the transaction.

- (b) Confidentiality Protection: An advisor or promoter obtains “confidential protection” in respect of the transaction, which is anything that prohibits disclosure of the details or the structure of the transaction.
- (c) Contractual Protection: The taxpayer, an advisor, or a promoter has “contractual protection” in respect of the transaction, which is any form of protection, such as an indemnity or a guarantee, that protects that person from a failure to obtain a tax benefit from the transaction.

11. In addition to the requirement on a taxpayer to file an information return with respect to a reportable transaction, every advisor or promoter for that transaction was also required to file an information return if they were entitled to a fee that was:

- (a) in the nature of the “Fee” hallmark set out above (i.e., related to the tax benefit provided by the reportable transaction); or
- (b) obtained in respect of any contractual protection that would trigger the “Contractual Protection” hallmark set out above.

12. However, under the Old Legislation, any advisor or promoter who would otherwise have been required to file an information return with respect to a reportable transaction was relieved of that obligation if an information return was filed by another person (such as the taxpayer or another advisor/promoter). Practically speaking, under the Old Legislation legal professionals would not be under any reporting obligation if the transaction was reported to the CRA by their client or another advisor (such as an accountant).

#### ***Bill C-47 and Amendment of the ITA***

13. In the 2021 federal budget (the “**2021 Budget**”), the government announced a proposal to enhance the ITA’s mandatory disclosure rules with respect to reportable transactions. The 2021 Budget identified a desire to ensure that a taxpayer’s disclosure regarding a reportable transaction could be verified as accurate and complete.

14. In April 2023, the federal government introduced Bill C-47, *An Act to implement certain provisions of the budget*. Bill C-47 proposed the amendments to the ITA’s mandatory disclosure rules in section 237.3 and added additional mandatory disclosure rules in 237.4 (the “**New Legislation**”).

#### ***The New Legislation***

15. The effect of the New Legislation is to:

- (a) lower the threshold for what constitutes a “reportable transaction” for reporting purposes;
- (b) introduce reporting requirements for a new (but not yet fully defined) category of “notifiable transactions”;
- (c) require all advisors, including legal professionals, to file an information return in respect of a reportable or notifiable transaction, regardless of whether another person does so;

- (d) shorten the deadlines for filing an information return from that previously provided for under the Old Legislation;
- (e) increase the penalties for failing to comply with the obligation to disclose reportable transactions, and make a failure to disclose notifiable transactions subject to these same increased penalties; and
- (f) extend the limitation period for a tax reassessment if a required information return for a reportable or notifiable transaction is not filed.

#### Lowering the Threshold for Reportable Transactions

16. The New Legislation considerably expands the definition of “reportable transaction”.
17. The New Legislation expands the definition of “avoidance transaction” under the ITA (which in turn expands the definition of “reportable transaction”). Whereas the Old Legislation used a “primary purpose” test to determine if a transaction was an avoidance transaction, the New Legislation deems a transaction to be an avoidance transaction if “it may reasonably be considered that one of the main purposes of the transaction, or of a series of transactions of which the transaction is a part, is to obtain a tax benefit.”
18. Second, previously two of the three “hallmarks” set out above were required for a transaction to be a reportable transaction under the Old Legislation. Under section 237.3 of the New Legislation, a transaction is a reportable transaction if only one of these “hallmarks” exists.

#### Introducing Reporting Requirements for Notifiable Transactions

19. Section 237.4 of the New Legislation also creates reporting requirements for a new category of transactions, “notifiable transactions”. A notifiable transaction is any transaction (or any transaction in a series of transactions) designated by the Minister of National Revenue (the “**Minister**”) as notifiable, as well as any transactions that are “substantially similar” to a transaction that has been designated as notifiable.
20. The New Legislation requires every advisor in respect of a notifiable transaction to file an information return.

### Legal Professionals are Required to Disclose

21. The New Legislation repeals section 237.3(4) of the ITA, which provided that legal professionals who were required to file a return with respect to a reportable transaction were not required to do so if the taxpayer or another advisor filed a return.

### Shortened Reporting Deadlines

22. Under the Old Legislation, information returns with respect to reportable transactions must be filed with the CRA before June 30 of the year following the year in which the transaction in question became reportable.

23. Under sections 237.3(5) and 237.4(9) of the New Legislation, information returns with respect to both reportable and notifiable transactions must be filed within 90 days of the taxpayer entering into the transaction or becoming contractually obligated to enter into the transaction.

### Increased Penalties

24. Under the Old Legislation, an advisor was only subject to a penalty of the amount of the professional fees they had charged in respect of the reportable transaction.

25. Under sections 237.3(8)(b) and 237.4(12) of the New Legislation, an advisor may be subject to a fine of up to \$110,000 for failing to report a reportable or notifiable transaction, plus any fees charged in respect of the transaction. This is in addition to the general offense provision in section 238 of the ITA, under which any person who fails to file a report when required to do so is guilty of an offence and liable for a fine up to \$25,000 and imprisonment of up to 12 months.

### What Must be Reported

26. *RC312 - Reportable Transaction and Notifiable Transaction Information Return* is the form of information return that must be filed in respect of both reportable and notifiable transactions. A significant amount of information must be reported under this form.

27. For example, with respect to a reportable transaction, any party filing an information return must provide a description of the details of the transaction “in sufficient detail for the Minister to be able to understand the tax structure of the transaction”, as well as a list of all advisors connected to the transaction with access to the information requested in the information return,

the nature and benefit of the tax benefit being sought, and the year in which it is expected to be used.

28. Sections 237.3(17) and 237.4(18) of the New Legislation provide that any information that it is “reasonable to believe” is subject to solicitor-client privilege does not have to be disclosed to the CRA. However, statements published by the federal government indicate that the government still expects legal professionals to disclose information regarding their clients to the CRA.

#### Deadline for Filing Information Returns

29. The first possible deadline to submit an information return under the New Legislation is September 21, 2023. The Federation is seeking an interlocutory exemption for legal professionals from the operation of the New Legislation pending the hearing and determination of this petition.

### **Part 3: LEGAL BASIS**

30. Section 52(1) of the *Constitution Act, 1982* provides that any law inconsistent with the Constitution is of no force or effect to the extent of the inconsistency.

31. The reporting requirements placed on legal professionals under the New Legislation contravene lawyers’ duty of commitment to the client’s cause, a constitutionally protected principle under section 7 of the *Canadian Charter of Rights and Freedoms* (the “**Charter**”). They also constitute an unreasonable search and seizure, contrary to section 8 of the Charter.

#### **A. The New Legislation Violates Section 7 of the Charter**

##### ***Guiding Constitutional Principles***

32. Section 7 provides that “everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

33. For the purpose of section 7, liberty includes freedom from physical restraint. A law that imposes a potential threat of imprisonment constitutes a threat to liberty.

34. The lawyers’ duty of commitment to the client’s cause is a recognized principle of fundamental justice that attracts constitutional protection. Where section 7 is engaged, the state cannot impose duties on lawyers that undermine their compliance with this duty.



***The New Legislation Infringes Legal Professionals' Liberty Interests***

35. Section 238 of the ITA makes a failure to file a return as required by the ITA an offence punishable by a fine and/or imprisonment of up to 12 months (in addition to the penalties provided for by sections 237.3 and 237.4 of the ITA).

36. Accordingly, the New Legislation engages the liberty interests of legal professionals.

***This Deprivation is Not in Accordance with the Principles of Fundamental Justice***

37. The New Legislation and the deprivation of legal professionals' liberty rights thereunder is not in accordance with lawyers' duty of commitment to the client's cause.

38. This is most clearly illustrated by the conflict between the requirements of legal professionals to report under the New Legislation and their ethical duties to their clients under the British Columbia *Code of Professional Conduct* (the "**BC Code**") (or, similarly, those set out in the *Model Code of Professional Conduct* published by the Federation).

39. The ethical duties set out in the BC Code (and the codes of conduct in other provinces and territories) encapsulate the broad duties of good faith and loyalty that are owed to clients by legal professionals in their fiduciary capacity. They are essentially a codification of how a legal professional must act in order to remain committed to their client's cause.

**Legal Professionals will be Required to Disclose Confidential Client Information**

40. Confidentiality is the cornerstone of the solicitor-client relationship, and an essential element of the lawyers' duty of commitment to the client's cause.

41. A lawyer has a duty to keep client information confidential (BC Code, Rule 3.3-1). This duty is wider than the ambit of solicitor-client privilege and includes, for example, the fact that a lawyer was retained or consulted by a client on a matter.

42. A lawyer also has a duty not to use or disclose a client's confidential information to the disadvantage of the client or the benefit of the lawyer without the client's consent (BC Code, Rule 3.3-2).

43. Under the New Legislation, legal professionals will be required to disclose confidential client information to the CRA.

Legal Professionals will be Placed in a Conflict of Interest

44. A legal professional cannot maintain commitment to the client's cause if they cannot act with undivided loyalty.

45. The New Legislation threatens legal professionals' ability to act with an undivided loyalty to their clients by pitting their self-interest against those of their clients.

***The Duty to Report Creates a Conflict of Interest***

46. A lawyer must not act where there is a conflict of interest. A conflict of interest exists when there is a substantial risk that a lawyer's loyalty to a client would be materially adversely affected by the lawyer's own interests or duties to another person (BC Code, Rule 3.4-1).

47. Any legislation that requires a legal professional to act in a conflict of interest with their client violates the principle of lawyers' duty of commitment to the client's cause.

48. The New Legislation will create a conflict between legal professionals' interests and those of their clients. This will arise when a legal professional is required to determine whether they are required to file an information return with respect to a reportable or notifiable transaction, including for the following reasons:

- (a) the definitions of what may constitute a reportable or notifiable transaction are broad, ambiguous, and subject to multiple potential interpretations;
- (b) due to the nature of the New Legislation and the criteria for what will be deemed a notifiable or reportable transaction, an assessment of this question will involve the application of legal judgment and tax principles;
- (c) the broad definition of an "advisor" under the ITA means that a wide range of legal professionals will have to make a qualitative analysis of whether a transaction must be reported or not, regardless of their experience in tax law, as will other legal professionals such as articling students and paralegals; and
- (d) as a result, reasonable legal professionals (and their clients) may disagree as to whether a transaction must be reported, or legal professionals may be unsure as to whether they are required to report a given transaction.

49. The financial penalties imposed on legal professionals under the New Legislation are significant and will expose legal professionals to significant personal liability. There is also the possibility of imprisonment.

50. Given these cumbersome penalties, legal professionals are strongly incentivized to report a transaction where it is unclear whether they are required to do so or where their client disagrees they are required to report. This places legal professionals' interests in direct conflict with their client's, contrary to the lawyers' duty of commitment to the client's cause.

51. Should legal professionals be charged with a penalty or offence, the natural source of information for the legal professional to defend themselves will be their client file, which will remain subject to solicitor-client privilege. This may in turn force a legal professional to choose between defending themselves against the offence or maintaining the confidentiality and privilege of their client's information.

### ***Disputes as to Privilege of Information***

52. Legal professionals may also find their interests in conflict with those of their clients when instructed to claim solicitor-client privilege over information by their clients. Absent instructions from the client to the contrary, a lawyer is expected to assert privilege regardless of the lawyer's view as to whether the document or information is actually privileged (BC Code, Rule 3.3-2.1).

53. If a client instructs a legal professional to assert a claim of privilege over certain information, but the legal professional believes that the claim of privilege is weak or unlikely to be considered reasonable, the legal professional would be ethically obligated to claim privilege over the information, but nonetheless be required under the ITA reporting rules to disclose the information or face penalty.

### ***Compromise of Quality and Availability of Legal Services***

54. The harm done to the solicitor-client relationship by the New Legislation has broad implications for the public interest.

55. The ability of clients to provide full and frank information to legal professionals without fear of the use of that information against them is critical to effective representation. Legislation that threatens this relationship between solicitor and client, as the New Legislation does, will damage

the public's faith in the legal profession and threaten the ability of the legal profession to provide effective client representation.

56. The issues identified above can also be expected to affect a legal professional's ability to provide open, honest, and objective advice to a client with respect to a potential transaction. While structuring a transaction in a way that might be considered notifiable or reportable may be in the client's best interest, it may be in the legal professional's best interest to recommend an alternative transaction structure that could not be considered notifiable or reportable, to avoid the possibility of the legal professional having to report or face sanction.

57. Finally, the significance of these issues and the dilemmas legal professionals will face when required to comply with the New Legislation will likely cause legal professionals to decide not to provide legal services on a matter that could be considered a reportable or notifiable transaction. Clients seeking legal advice may therefore find it difficult to obtain legal services with respect to transactions that are potentially notifiable or reportable.

## **B. The New Legislation Violates Section 8 of the Charter**

### ***Guiding Constitutional Principles***

58. Section 8 of the Charter provides that everyone has the right to be secure against unreasonable search and seizure.

59. Assessing a breach of section 8 requires a two-part analysis of whether: a) the government action intrudes upon an individual's reasonable expectation of privacy, in which case it constitutes a seizure within the meaning of section 8; and b) the seizure is an unreasonable intrusion on that right to privacy.

60. A client has a reasonable expectation of privacy with respect to all information provided to their counsel, which lawyers are ethically required to keep confidential.

61. A client's expectation of privacy is at its highest with respect to information subject to solicitor-client privilege. Any legislative provision that interferes with solicitor-client privilege more than is absolutely necessary will be labelled unreasonable.

62. The significant protection accorded to information provided to a legal professional by the client is unaffected by the context in which that information is provided, including in the context of investigation of a taxpayer by the CRA.

***The New Legislation Unreasonably Intrudes on Clients' Reasonable Expectations of Privacy***

63. A requirement on legal professionals to disclose confidential client information to the CRA intrudes upon the taxpayer's expectation of privacy with respect to information provided to their counsel and constitutes a seizure.

64. This seizure is an unreasonable intrusion into the client's right to privacy, which is at its highest with respect to information provided to their legal counsel.

65. The New Legislation unreasonably intrudes on a client's expectation of privacy in, among others, the following ways:

- (a) There is a significant possibility that confidential information provided by a legal professional to the CRA will be used against their client by the CRA and will result in the client becoming subject to investigation, regulatory penalties, sanctions, and potential imprisonment.
- (b) While information that it is "reasonable to believe" is subject to solicitor-client privilege does not have to be disclosed, the assessment of whether solicitor-client privilege attaches to a particular document or piece of information involves qualitative analysis and is often subject to dispute.
- (c) There is no mechanism in the New Legislation to resolve disagreements between legal professionals and their clients as to the ambit of solicitor-client privilege. The imposition of significant fines and penalties on legal professionals who fail to file a return when required will incentivize them to do so in uncertain situations, increasing the possibility of intrusion with respect to a client's privileged information.
- (d) Should a legal professional make an incorrect (or allegedly incorrect) assessment of the existence of solicitor-client privilege and disclose information to the CRA on

that basis, privilege will be waived, and the client may have that information used against them by the CRA.

- (e) If a legal professional is fined or charged with an offence, they will likely be forced to rely on confidential and privileged information in their defence, to the detriment of the client.
- (f) There is no mechanism in the New Legislation for a legal professional to claim solicitor-client privilege over information if their client or another advisor or promoter has arguably waived privilege over that information in providing their own information return.

***The New Legislation Cannot be Saved by Section 1***

66. The New Legislation does not minimally impair the lawyers' duty of commitment to the client's cause or clients' reasonable expectation of privacy with respect to information held by their counsel.

67. The New Legislation cannot be saved under section 1 of the Charter.

**Part 4: MATERIALS TO BE RELIED ON**


68. Affidavit #1 of Michael Colborne, made September 11, 2023;

69. Affidavit #1 of Jill Perry, made September 11, 2023; and

70. Such other and further materials as counsel may advise.

The Petitioner estimates that the hearing of the petition will take five days.

Date: September 11, 2023

  
Signature of Roy Millen / Claire Hildebrand /  
Patrick Palmer  
Lawyers for the Federation of Law Societies  
of Canada

***To be completed by the court only:***

Order made

☐ in the terms requested in paragraphs ..... of Part 1 of  
this petition

☐ with the following variations and additional terms:

.....  
.....  
.....

Date: ....[dd/mmm/yyyy].....

.....  
Signature of ☐ Judge ☐ Master