



Federation of
Law Societies
of Canada

Fédération des ordres
professionnels de juristes
du Canada

Submission of the
Federation of Law Societies of Canada
to the
Senate Standing Committee on National Finance

Bill C-47 – Proposed Mandatory Disclosure Rules amendments under the Income Tax Act

Ottawa, May 29, 2023

INTRODUCTION

1. The Federation of Law Societies of Canada (“the Federation”), on behalf of its member law societies, appreciates the opportunity to provide comments on the proposed amendments to the Income Tax Act (“ITA”) under sections 68 and 69 of Bill C-47, *An Act to implement certain provisions of the budget* tabled in Parliament on March 28, 2023.
2. The Federation is the national association of the 14 regulators of the legal profession in Canada. Our member law societies are mandated by legislation in each province and territory with the responsibility for regulating more than 136,000 lawyers, 4,200 notaries in Quebec, and Ontario’s nearly 10,600 licensed paralegals in the public interest. An important role of the Federation is to express the views of the law societies on national and international issues relating to the administration of justice and the rule of law.
3. If enacted, amendments to the ITA that would create new obligations on legal professionals to report to the Canada Revenue Agency (“the CRA”) on a broad range of tax-related client transactions, under the threat of severe penalties, could have serious consequences for the solicitor-client relationship and independence of the legal profession, principles that are fundamental to the rule of law and Canada’s justice system. As outlined below, the Supreme Court of Canada has consistently held that legal professionals, when acting in their capacity as legal counsel, must not be required to report their clients’ affairs to the government.

Proposed Amendments to Mandatory Disclosure Rules under the Income Tax Act

4. The Federation made submissions to the Department of Finance and the House of Commons Standing Committee on Finance raising concerns about the reportable transactions rules that came into effect in 2012. The proposed amendments – lowering the threshold for reportable transactions (s. 237.3 of the ITA), introducing new reporting requirements for “notifiable transactions” or “substantially similar” transactions (s. 237.4 of the ITA) and significantly increasing the penalties for failing to comply with the reporting requirements (among other changes) – exacerbate the problems with the mandatory reporting regime.
5. The expanded reporting requirements and penalties would continue to apply to taxpayers and their advisors, which is defined broadly and would include legal professionals. However, the amendments would eliminate the existing relieving rule (s. 237.3(4) of the ITA) that treats disclosure of a transaction by one party as disclosure by all parties; in other words, reporting by one person (e.g. the taxpayer) will no longer discharge another’s obligation to report (e.g. the advisor).
6. The Federation notes the proposed amendments exempting from disclosure any information reasonably believed to be subject to solicitor-client privilege (s. 237.3(17) and s. 237.4(18) of the ITA). The government has, however, stated that legal professionals acting in their professional capacity would “nevertheless be expected to provide information for which solicitor-client privilege does not exist”¹ including confidential client information.

¹ Explanatory notes of the Legislative Proposals relating to Income Tax Act and Other Legislation, section 237.4(20), online: <https://fin.canada.ca/drlég-apl/2022/ita-lir-0222-1-n-eng.html>.



7. Compelling legal professionals to disclose confidential client information under threat of penalty if they fail to do so creates an irreconcilable conflict between the legal professionals' personal interests and those of their clients. Such reporting is antithetical to the solicitor-client relationship and could undermine the duty of loyalty that legal professionals owe to their clients as a function of their fiduciary relationship.
8. In *Canada (Attorney General) v. Federation of Law Societies*² the Supreme Court of Canada recognized as a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their client's cause. The duty is fundamental to the solicitor-client relationship and how the state and individuals interact in legal matters. As a principle of fundamental justice, the duty of commitment to the client's cause exists for the benefit of the people of Canada and is essential to maintaining confidence in the integrity of the administration of justice. Subject to a constitutionally-compliant justification, the state cannot impose obligations on legal professionals that undermine their compliance with the duty, either in fact or in the perception of a reasonable person. As the Supreme Court stated (at paras. 81 and 83):

The duty of lawyers to avoid conflicting interests is at the heart of both the general legal framework defining the fiduciary duties of lawyers to their clients and of the ethical principles governing lawyers' professional conduct. This duty aims to avoid two types of risks of harm to clients: the risk of misuse of confidential information and the risk of impairment of the lawyer's representation of the client...

A client must be able to place 'unrestricted and unbounded confidence' in his or her lawyer; that confidence which is at the core of the solicitor-client relationship is a part of the legal system itself, not merely ancillary to it.... 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.

9. The proposed amendments under ss. 68 and 69 of Bill C-47 to expand the mandatory disclosure rules for tax-related transactions threaten these bedrock principles. The Federation takes no issue with the goals of the disclosure requirements - identifying potentially abusive transactions and their participants - but the means used to accomplish those goals must not sacrifice principles of fundamental justice for administrative convenience.
10. It is the Federation's position that by requiring legal professionals to use confidential and privileged knowledge of their clients' affairs to report those clients to the government, the amendments would put legal professionals in a similar position to that imposed by the suspicious transaction reporting regime and other regulations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, which the Supreme Court of Canada declared unconstitutional in its decision *Canada (Attorney General) v. Federation of Law Societies of Canada*. Requiring legal professionals to report on their client's affairs to the government would effectively make them agents of the state, singling out clients for further investigation, potentially to their detriment. Clients and the public generally could reasonably perceive that legal professionals are, at least in part, acting on behalf of the government by collecting and disclosing confidential client information without the client's consent.

² 2015 SCC 7 (CanLII), [2015] 1 SCR 401, see paras. 95 to 103.



Such a regime does not accord with the existence of a strong and independent legal profession serving clients in the public interest. Further, including legal professionals in the reporting requirements is not necessary as the objectives of the legislation can be met by imposing the obligation on taxpayers and other advisors.

RECOMMENDATION

11. The Federation recommends that the definition of “advisor” under sections 68 and 69 Bill C-47 be amended to specifically exempt legal professionals acting in their capacity as legal counsel from the mandatory disclosure requirements under the expanded reportable transactions regime in section 237.3 of the ITA and the new notifiable transactions regime in the proposed section 237.4 of the ITA.
12. The Federation also recommends that the government maintain the current language of s. 237.3 (4) of the ITA under which reporting by one person about a transaction relieves others with a duty report from the obligation of doing so. Maintaining this provision would be particularly important if the exemption of legal counsel from the definition of advisor is rejected. While an imperfect solution, the relieving provision in s. 237.3(4) does have the potential effect of reducing the impact of the reporting obligations on legal counsel.

CONCLUSION

13. The Federation would welcome the opportunity to appear before the Senate Standing Committee on National Finance to further explore the concerns set out above and to explore possible solutions.

