

Federation of Law Societies
of Canada



Fédération des ordres professionnels
de juristes du Canada

**Submission to the Standing Committee on Finance in Respect of
Bill C-48 *An Act to amend the Income Tax Act, the Excise Tax
Act, the Federal-Provincial Fiscal Arrangements Act, the First
Nations Goods and Services Tax Act and related legislation
(Technical Tax Amendments Act, 2012)***

Federation of Law Societies of Canada

Ottawa, February 21, 2013

INTRODUCTION

1. The Federation of Law Societies of Canada wishes to express its concerns regarding proposed amendments to the *Income Tax Act*, as set out in Bill C-48, *An Act to amend the Income Tax Act, the Excise Tax Act, the Federal-Provincial Fiscal Arrangements Act, the First Nations Goods and Services Tax Act and related legislation* (“Bill C-48” or “the Bill”).

2. The Federation of Law Societies of Canada is the national coordinating body of the 14 provincial and territorial governing bodies of the legal profession in Canada. Our member law societies are charged with the responsibility of regulating Canada’s 100,000 lawyers and 4,000 notaries in Quebec in the public interest. The Federation is a leading voice on a wide range of issues of national and international importance involving justice and regulatory matters critical to the protection of the public.

SUBMISSIONS

3. Bill C-48 proposes amendments to the *Income Tax Act* that would require taxpayers and their advisors to file an information return with the Minister regarding every “reportable transaction”. A “reportable transaction” is a tax “avoidance transaction”, defined in s. 273.3(1) of the Act that bears at least two of three hallmarks of aggressive tax planning: (a) advisors’ or promoters’ fees contingent on tax benefits; (b) confidentiality provisions; and (c) contractual indemnity for anticipated tax benefits. “Advisor” is broadly defined and would include legal professionals advising on the creation and / or implementation of transactions. The penalty for failure to report can include the advisor’s fee in respect of the transaction.

4. The Federation supports the government’s policy objective of promoting fairness in the income tax system and ensuring the integrity of the self-assessment system. However, the Federation is gravely concerned that the proposed legislation would impose duties on legal professionals that are antithetical to the independence of the bar and the duty of loyalty that all members of the profession owe to their clients.

5. The Federation strongly believes that legal professionals, when acting in their capacity as such, must not be required to report their clients’ affairs to the government. In a series of legal proceedings in 2001 and 2002, the Federation obtained court orders exempting legal professionals

from the suspicious transaction reporting regime imposed under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (“PCMLTFA”).¹ Following those proceedings, the government repealed the regulations imposing reporting requirements on legal counsel.

6. In response to a renewed attempt by the government to make the regulations under the PCMLTFA applicable to members of the legal profession, the legal proceedings were renewed and in September 2011 the British Columbia Superior Court upheld Federation’s claim that the application of the anti-money laundering regime to members of lawyers and Quebec notaries is unconstitutional². The government appealed that ruling to the British Columbia Court of Appeal and a decision in the appeal is pending.

7. The Federation is concerned that the proposed revisions to the *Income Tax Act* would put legal counsel in a similar position to that imposed by the suspicious transaction reporting regime and other regulations under the PCMLTFA. The draft legislation would require legal professionals to use their confidential and privileged knowledge of their clients’ affairs – tax transactions on which the legal counsel provided advice – to report those clients to the government. The purpose of the reporting regime is to assist the government in identifying potentially abusive transactions and their participants. Legal counsel would become agents of the state, singling out clients for further state investigation, potentially to their detriment. Such a regime would not accord with the existence of a strong and independent bar serving clients in the public interest.

8. The proposed reporting requirement would also put legal professionals in conflict with the duty of loyalty owed to their clients. Legal counsel operate under strict codes, imposed by the provincial and territorial regulators and the common law, that require them to be loyal to their clients and avoid conflicts between their interests and those of their clients. These duties ensure the integrity of our system of justice. The proposed legislation threatens these bedrock principles because it would not be in clients’ interests to have their legal advisors report clients’ affairs to the government. It would be particularly problematic in cases where clients believed their transactions were not required to be reported. Legal professionals might be inclined to report in order to minimize their potential exposure to personal penalty, putting them in direct conflict with their clients.

¹ 2001 BCSC 1593, aff’d 2002 BCCA 49; [2001] A.J. No. 1697 (Q.B.); (2002), 57 O.R. (3d) 383 (S.C.J.); 2002 NSSC 95; 2002 SKQB 153.

² *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2011 BCSC 1270

RECOMMENDATION

9. The Federation recommends that Bill C-48 be amended to specifically exempt lawyers and Quebec notaries from the reporting obligations under proposed section 237.3 when acting in their capacity as legal counsel.

CONCLUSION

10. The Federation would welcome an opportunity to appear before the Committee to discuss these submissions and to answer any questions that members of the Committee may have.

