



Federation Challenge of Income Tax Act Provisions

BACKGROUND

Recent amendments to the *Income Tax Act* (the Act) that require legal counsel to report confidential information about their client's activities to the Canada Revenue Agency (CRA) infringe the *Canadian Charter of Rights and Freedoms* and principles of fundamental justice that exist for the benefit of the people of Canada. The Federation and its 14 law society members support the government's efforts to address tax avoidance. It is essential, however that the means used do not undermine important rights and freedoms.

In an application filed on September 11, 2023, in the Supreme Court of British Columbia, the Federation is challenging the constitutionality of amendments to the Act that expand existing mandatory disclosure obligations, create a new category of notifiable transactions, and delete a provision that relieved parties from the disclosure obligation when it had been fulfilled by another party to the transaction. The amendments came into force at the end of June. The provisions, which require taxpayers and advisors, including legal counsel, to report to the CRA on transactions that may constitute aggressive tax planning, compel legal counsel to disclose confidential and potentially privileged client information to the government and undermine the duty of loyalty owed by members of the legal profession to their clients.

The Federation raised concerns about the amendments with government officials and in proceedings before Parliament prior to adoption of the provisions. In submissions to the **House of Commons Standing Committee on Finance** and the **Standing Senate Committee on National Finance**, and in meetings with officials of the Ministers of Finance and Justice, the Federation argued that the provisions threaten solicitor-client privilege and the independence of the legal profession, and undermine legal and ethical duties legal counsel owe their clients, including the duty of commitment to the client's cause.

Although exempting legal counsel from the disclosure obligations would not deprive the government of information it needs to combat tax avoidance as it would receive this information from taxpayers, promoters, and other advisors, neither the government nor Parliament addressed the Federation's concerns.

Lawyers and other members of the legal profession, owe a duty of commitment to their client's cause and are also bound by rules of professional conduct to maintain the confidentiality of information received from their clients. These principles are essential to the proper functioning of Canada's justice system. They ensure that individuals receive legal advice informed by full and candid disclosure to their legal counsel that is uninfluenced by counsel's own self-interest. The new provisions, which include significant financial penalties and potential imprisonment for failure to file the required disclosure returns, force legal counsel to choose between their own interests and those of their clients, undermining these important ethical duties and placing legal counsel in an irreconcilable conflict of interest.

In its petition to the BC court, the Federation argues that the recent amendments to the *Act* violate sections 7 and 8 of the *Charter* and undermine the duty of commitment to the client's cause. The case raises many of the same issues that were at play in the Federation's successful challenge to the application of provisions in the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and related regulations to members of the legal profession. That case resulted in a 2015 decision from the Supreme Court of Canada (*Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC) recognizing the duty of commitment to the client's cause as a principle of fundamental justice. The Court held that the legislation violated both section 7 and section 8 of the *Charter* in its operations as against lawyers and was therefore unconstitutional.

The Federation is seeking an interim order exempting legal counsel from the application of the new mandatory reporting provisions in the *Act* pending the outcome of its legal challenge. Such an order is necessary to prevent irreparable damage to public confidence in the independence of the bar, the sanctity of confidential information held by legal professionals, and a client's ability to provide full and frank information to their counsel without fear of it being disclosed to and used against them by the government. A hearing on the application for an injunction has been set for October 20, 2023.

In the meantime we have successfully negotiated a consent injunction suspending application of the challenged provisions of the *Income Tax Act* to lawyers and articling students in all provinces and territories, notaries in Quebec and paralegals in Ontario. The injunction will be in place until the earlier of the Court's decision on our injunction application or November 20, 2023.

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 141,000 lawyers, 3,850 notaries in Quebec, and Ontario's 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.