No. S236280
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

FEDERATION OF LAW SOCIETIES OF CANADA

PETITIONER

AND

ATTORNEY GENERAL OF CANADA

RESPONDENT

WRITTEN SUBMISSIONS OF THE PETITIONER, FEDERATION OF LAW SOCIETIES OF CANADA

APPLICATION FOR INTERIM INJUNCTION

Counsel for the Petitioner,
Federation of Law Societies of Canada

BLAKE, CASSELS & GRAYDON LLP
Barristers and Solicitors
1133 Melville Street
Suite 3500, The Stack
Vancouver, BC V6E 4E5
Telephone: 604.631.3300
Email: roy.millen@blakes.com
Email: claire.hildebrand@blakes.com

Counsel: Roy W. Millen
Claire Hildebrand

Counsel for the Attorney General of Canada

British Columbia Regional Office
Department of Justice, National Litigation Sector
900-840 Howe Street, Vancouver, BC V6Z 2S9
Telephone: 236.330.0624
Email: loretta.chun@justice.gc.ca
Email: yianni.pappas-acreman@justice.gc.ca
Email: kezia.messakh@justice.gc.ca

Counsel: Loretta Chun
Yianni Pappas-Acreman
Kezia Messakh

Date:	October 20, 2023
Time:	10:00 am
Place of Application:	Vancouver, BC
Written Submissions provided by:	Federation of Law Societies of Canada
To be Heard Before	Judge

TABLE OF CONTENTS

I. OVERVIEW

1. This application for interlocutory injunctive relief is brought by the Federation of Law Societies of Canada (the "**Federation**") as part of its constitutional challenge to recent amendments to the *Income Tax Act* (the "***ITA***").[1]

2. The Federation ultimately seeks a declaration that legal professionals are exempt from new mandatory disclosure rules in the *ITA* (the "**New Legislation**").

3. These new disclosure rules require legal professionals to report to the Canada Revenue Agency (the "**CRA**") with respect to certain transactions entered into by their clients. They require legal professionals to report to the CRA on two broad categories of transactions: "reportable transactions" (which meet certain statutory hallmarks) and "notifiable transactions" (which are any category of transaction the Minister designates as notifiable). These are lawful transactions that the Minister of National Revenue (the "**Minister**") wishes to investigate further in order to determine if they are "abusive" from a taxation perspective.

4. Under the New Legislation, any legal professional involved with a reportable or notifiable transaction must report a significant amount of information about their client to the CRA. The information that must be reported includes an explanation as to why the legal professional views the transaction as reportable or notifiable, how the transaction is structured, and what the anticipated tax benefits of the transaction will be. Failure to do so may result in fines in excess of $100,000 and imprisonment.

5. The government claims that requiring legal professionals to report on their clients is necessary to allow the government to verify taxpayer information.[2] The Federation says that this is an unconstitutional attempt to turn legal professionals into agents of the state, contrary to both sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* (the "***Charter***") and longstanding jurisprudence from this Court and the Supreme Court of Canada. Requiring legal professionals to assist the CRA in its investigation and potential prosecution of their clients is fundamentally antithetical to counsel's independence and role as trusted advisor.

---

[1] R.S.C. 1985, c. 1

[2] Application Response of the Attorney General filed September 29, 2023, Part 4, para. 3 [Application Response]

6. On this application, the Federation seeks limited injunctive relief pending the determination of its constitutional challenge to the New Legislation.

7. Injunctive relief in constitutional cases is granted sparingly. However, this Court has previously granted interim injunctive relief to the Federation in a constitutional challenge it brought to legislation that imposed analogous reporting requirements on legal professionals.[3] This relief was granted because enforcing the legislation (which the Supreme Court of Canada ultimately determined was unconstitutional) prior to a hearing on the merits would irrevocably damage the solicitor-client relationship and harm the public interest.[4]

8. The same analysis applies to this application: there is significant risk to the public interest if injunctive relief is not granted. Absent a temporary exemption, the New Legislation will require legal professionals to report confidential client information to the government and act in a conflict of interest with their clients. This will damage public confidence in the legal profession's duty of loyalty to its clients and irrevocably harm the solicitor-client relationship.

9. There is no prejudice to the government or the public interest if temporary injunctive relief is granted. Taxpayers, promoters, and other advisors will still be required to report all of the information sought by the CRA. A hearing on the merits of the Federation's constitutional challenge can occur as soon as the government is ready. The existing injunction order, issued by consent of the parties, ought to be extended until the constitutional challenge is resolved by this Court.

II. FACTS

A. THE FEDERATION OF LAW SOCIETIES OF CANADA

7. The Federation is the national association of the 14 provincial and territorial bodies governing legal professionals in Canada.

8. Each of the Federation's member law societies has a statutory mandate to regulate the legal profession in the public interest.[5] As the national association of these law societies, the

[3] *Law Society v. A.G. Canada*, 2001 BCSC 1593 [*PCA Injunction Decision*]

[4] *PCA Injunction Decision*, para. 82

[5] Affidavit #1 of Jill Perry, filed September 11, 2023 (the "**Perry Affidavit**"), para. 9

Federation seeks to strengthen Canada's system of governance of an independent legal profession and reinforce public confidence in the legal profession.[6]

9. This Court has previously described the Federation as 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."[7] The Federation has acted as a party or an intervenor in a significant number of cases involving the public interest and the obligations of legal professionals.[8]

10. The Federation's commencement of this proceeding was approved by a unanimous motion of its members, the 14 law societies of Canada.[9]

B. PRIOR MANDATORY DISCLOSURE RULES UNDER ITA

11. In 2013, Parliament adopted legislation that added section 237.3 to the *ITA*. Section 237.3 established rules regarding a defined class of "reportable transactions" (the "**Old Legislation**").[10]

12. Reportable transactions are a particular type of "avoidance transaction". An avoidance transaction is defined by reference to section 245 of the *ITA*, often referred to as the "General Anti-Avoidance Rule" (the "**GAAR**"). An avoidance transaction is any transaction that results in a tax benefit and cannot reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain that tax benefit.[11]

13. The GAAR does not render transactions illegal or reversible. If the Minister concludes that a transaction violates the GAAR, then the taxpayer may be denied the tax benefits it would have otherwise obtained.[12]

14. Contrary to the suggestion in the Attorney General's Application Response, reportable transactions are not abusive, illegal or tax evasion.[13] They do not automatically violate the GAAR, which applies a higher standard to determine if a transaction is an "avoidance transaction" and

---

[6] Perry Affidavit, para. 10

[7] *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2011 BCSC 1270, para. 6

[8] Perry Affidavit, para. 25

[9] Perry Affidavit, para. 17

[10] Affidavit #1 of Michael Colborne, filed September 11, 2023 (the "**Colborne Affidavit**"), para. 16

[11] *ITA*, s. 245(3); Colborne Affidavit, para. 14

[12] *ITA,* s. 245(2) and (5)

[13] Colborne Affidavit, para. 91

requires a finding that the avoidance transaction in question is abusive.[14] Rather, reportable transactions are simply tax planning schemes the government considers to be potentially abusive and therefore wishes to obtain further information on (although there is no evidence as to Parliamentary intent before the Court).

15. The Old Legislation defined a "reportable transaction" 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 it exhibits any two of the following three features or "hallmarks":

(a) Fee: An advisor or promoter (see definitions below) is entitled to a fee that is i) based on the amount of a tax benefit that results from the transaction, ii) contingent upon obtaining a tax benefit from the transaction, or iii) attributable to the number of people who participate in the avoidance transaction or have access to an opinion given by the advisor or promoter of the transaction.

(b) Confidentiality Protection: The promoter or advisor of the transaction obtains "confidential protection" in respect of the transaction (meaning, generally, anything that prohibits the disclosure to any person or to the Minister of the details or the structure of the transaction).

(c) Contractual Protection: The taxpayer or their promoter or advisor has or had a "contractual protection" in respect of the transaction (meaning, generally, any form of protection, including an indemnity or a guarantee, that protects a person from a failure of the transaction to achieve a tax benefit).[15]

16. An "advisor" includes any person who provided any advice or assistance with respect to creating, developing, planning, organizing, or implementing the transaction, as well as any person who provided any contractual protection. A promoter includes any person who promoted or accepted consideration in relation to the transaction.[16]

[14] *Deans Knight Income Corp. v. Canada*, 2023 SCC 16 para. 51; *ITA* s. 245(2) and (4)

[15] Old Legislation, s. 237.3(1), Colborne Affidavit, para. 17

[16] Old Legislation, s. 237.3(1)

17. Under section 237.3 of the Old Legislation, every person who received a tax benefit from a reportable transaction was required to report the transaction by filing an information return to the CRA.

18. "Advisors" could also be required to report a reportable transaction if:

(a) they were entitled to a fee of the type that would be captured by the "Fee" hallmark;[17] or

(b) they were entitled to a fee that was in respect of contractual protection that would trigger the "Contractual Protection" hallmark.[18]

19. However, under the Old Legislation legal professionals and other advisors were not required to file an information return where their client or another advisor (for example, an accountant) had done so.[19] Section 237.3(4) of the Old Legislation provided that the filing of an information return by one party (i.e., the taxpayer) meant that any other party required to file a return was deemed to have done so.[20]

C. BILL C-47

20. In the 2021 federal budget (the "**2021 Budget**"), the government announced its intention to amend the mandatory disclosure rules in the Old Legislation.

21. One component of the government's proposal was a so-called "dual reporting" approach. Parliament indicated that the purpose of the dual reporting approach was to use the promoter's (and now advisor's) reports to verify the information provided by the taxpayer:

> A dual reporting approach can also reduce the risk of inadequate disclosure because, for example, a taxpayer's disclosure can be checked against the promoter's disclosure to assess whether the information provided is accurate and complete.
>
> …
>
> It is further proposed that reporting (as a reportable transaction) of a scheme that, if implemented, would be a reportable transaction be required

[17] Old Legislation, s. 237.3(2)(c)(i)

[18] Old Legislation, s. 237.3(2)(c)(ii)

[19] Colborne Affidavit, para. 22

[20] Old Legislation, s. 237.3(4)

> to be made by a promoter or advisor (as well as by persons who do not deal at arm's length with the promoter or advisor and who are entitled to receive a fee with respect to the transaction) within the same time limits.[21]

22. In April 2022, the Federation made submissions to the Department of Finance asking that legal professionals be exempt from the proposed mandatory reporting rules in the 2021 Budget.[22]

23. In April 2023, the government introduced Bill C-47, *An Act to Implement Certain Provisions of the Budget*. Bill C-47 proposed amendments to the *ITA*'s mandatory disclosure rules similar to those in the 2021 Budget.[23]

24. In May 2023, the Federation made submissions on Bill C-47 to the Senate Standing Committee on National Finance, again recommending that legal professionals be exempt from the proposed legislation.[24]

25. The Federation did not receive any response to its submissions on Bill C-47. Bill C-47 received Royal Assent on June 22, 2023, bringing the New Legislation into force.[25]

D. MANDATORY DISCLOSURE RULES UNDER THE NEW LEGISLATION

26. Bill C-47 significantly expanded the mandatory disclosure rules for reportable transactions. All legal professionals involved in a reportable transaction are now required to report on their clients to the CRA. It also created mandatory disclosure rules with respect to "notifiable transactions", a new category of transactions. Key aspects of the new disclosure rules are described below.

(1) Reporting Requirements for Notifiable Transactions

27. The New Legislation creates reporting requirements for notifiable transactions, a second category of transactions that must be reported to the CRA.

28. The New Legislation defines "notifiable transactions" broadly. A notifiable transaction is:

---

[21] Perry Affidavit, para. 28 and Exhibit E (p. 163)

[22] Perry Affidavit, para. 34

[23] Perry Affidavit, para 29

[24] Perry Affidavit para. 35

[25] Perry Affidavit, para 30

(a) any transaction that is the same as, or substantially similar to, a transaction that is designated at that time by the Minister; and

(b) any transaction in a series of transactions that is the same as, or substantially similar to, a series of transactions that is designated at that time by the Minister.

29. The New Legislation also defines "substantially similar" broadly and states that the term is to be interpreted in favour of disclosure.[26]

30. The Minister has not yet designated any transactions as notifiable.[27] The New Legislation does not limit the types of transactions that can be designated as notifiable. The CRA has stated that the Minister intends to designate transactions as notifiable both to detect abusive tax transactions and to gather information to determine whether particular types of transactions are abusive."[28]

(2) Lower Threshold for "Reportable Transactions"

31. The Old Legislation defined a reportable transaction as an "avoidance transaction" (as defined by the GAAR) in which two of three "hallmarks" existed: a fee arrangement, confidentiality protection, or contractual protection.[29]

32. The New Legislation expands the definition of "reportable transaction":

(a) A transaction is now a reportable transaction if, at any time, 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" (emphasis added).[30] This is lower than the threshold for an avoidance transaction under the GAAR, which continues to use the "primary purpose" test.[31]

[26] Colborne Affidavit, para. 31; *ITA*, s. 237.4

[27] Colborne Affidavit, para. 34

[28] Colborne Affidavit, Exhibit B (p. 18)

[29] Old Legislation, s. 237.3(1) "reportable transaction"

[30] New Legislation, s. 237.3(1) "avoidance transaction"

[31] Colborne Affidavit, para. 27(a)

(b) Now only one (not two) of the three "hallmarks" set out above in paragraph 15 is required for the transaction to be reportable.[32]

33. Notably, the "contractual protection" hallmark includes any form of protection, including an indemnity or a guarantee, that protects a person from a failure of the transaction to achieve a tax benefit.[33] On its face this definition may capture many common transactions.[34]

(3) Legal Professionals are Required to Report in addition to Taxpayers and Others

34. Bill C-47 repealed section 237.3(4) of the *ITA*, which provided that advisors (including legal professionals) were not required to file an information return for a reportable transaction if the taxpayer or another advisor had done so. This means that all legal professionals now have an independent obligation to report reportable and notifiable transactions that cannot be satisfied by their clients or other advisors.

(4) Shortened Reporting Deadlines

35. Bill C-47 shortens the deadlines for filing an information return with the CRA for reportable transactions and notifiable transactions.

36. Under the Old Legislation, information returns for reportable transactions had to be filed by June 30th of the calendar year following the calendar year in which the transaction became reportable. [35] Under the New Legislation, information returns for reportable and notifiable transactions must be filed within 90 days of the earlier of the taxpayer i) becoming contractually obligated to enter the transaction, or ii) entering the transaction.[36]

37. Taxpayers and their advisors, including legal professionals, now have only 90 days under the New Legislation to determine whether they have a duty to report and fulfill that duty. Under the Old Legislation they had a minimum of six months.

---

[32] New Legislation, s. 237.3(1) "reportable transaction"

[33] Old Legislation, s. 237.3(1), Colborne Affidavit para 17

[34] Colborne Affidavit, para 27(b)

[35] Old Legislation, s. 237.3(5)

[36] New Legislation, s. 237.3(5), 237.4(9)

38. With the New Legislation having come into force on June 22, 2023, the 90-day reporting deadline commenced as of September 21, 2023—hence this application.

(5) Increased Penalties for Failing to Report

39. Bill C-47 significantly increases the penalties on advisors, including legal professionals, for failing to report a reportable or notifiable transaction.

40. Under the Old Legislation, an advisor who failed to report could only be subject to a penalty of the amount of the professional fee they had charged in respect of the reportable transaction.[37] Under the New Legislation, in addition to a penalty in the amount of their fee, an advisor may be fined $10,000 plus $1,000 per day while not in compliance, up to $100,000.[38]

41. The general offence provision in section 238 of the *ITA* also applies. Under section 238, any person who fails to file a return as required by the *ITA* is guilty of an offence and, in addition to the penalties provided for elsewhere in the *ITA*, is liable to a fine of up to $25,000 and imprisonment for a term of up to 12 months.

(6) Extended Limitation Period for Reassessment

42. Bill C-47 extended the period during which the CRA may reassess a taxpayer if a return for a reportable or notifiable transaction is not filed.

43. Subsection 152(4) of the *ITA* permits reassessment after expiry of a normal reassessment period in certain circumstances. Sections 152(4)(b.5) and 152(4)(b.6) of the New Legislation now permit reassessment after the normal reassessment period for reportable and notifiable transactions. For a taxpayer who expects to receive a tax benefit from the transaction, reassessment is permitted until four years after the day on which “the information return is filed”. For others, reassessment is permitted until three years after the day on which “the information return is filed”.

[37] Old Legislation, s. 237.3(8)

[38] New Legislation, s. 237.3(8)(b); s. 237.4 (12)(b)

E. WHAT INFORMATION MUST BE REPORTED?

44. Taxpayers and advisors (including legal professionals) must submit a *RC312 - Reportable Transaction and Notifiable Transaction Information Return* form (the "**Form**") for any reportable or notifiable transaction.[39]

45. With respect to a reportable transaction, the Form requires the filing party to provide:

(a) a description of the reportable transaction;

(b) the date the reportable transaction is required to be disclosed;

(c) what hallmarks of a reportable transaction apply to the transaction;

(d) a list of all advisors connected with the reportable transaction who have access to the information requested in the Form;

(e) the nature and amount of the tax benefit being sought, as well as the year in which it is expected to be used; and

(f) the details of the transaction.[40]

46. The section of the Form requiring the filing party to provide details of the reportable transaction solicits the filing party's legal analysis of the reportable transaction. The Form requires that the filing party describe and explain the tax treatment of the transaction and provide references to the *ITA*, regulations, and related rules. The filing party may also refer to court decisions and CRA guidance documents. The Form states:

> Identify and describe the reportable transaction or series of transactions in sufficient detail for the [Minister] to be able to understand the tax structure of all transactions. In addition, describe the expected, claimed, or purported tax treatment of all potential benefits expected to result from the transaction or series of transactions. Include any additional steps that are anticipated to occur. You may include any reference to any material used to determine the tax treatment of the transaction or series of transactions (technical interpretation, ruling, court decision, folio, interpretation bulletin, or other government document)".

[39] Colborne Affidavit, para. 46 and Exhibit C (p. 32-40)

[40] Colborne Affidavit, Exhibit C (p. 34-35)

…

> Provide references to the following: The Act, Income Tax Regulations (Reg), Income Tax Application Rules (ITAR), Tax Treaty (Treaty) or Other legislation (Other) (for example, 85(1) of the Act).[41]

47. With respect to notifiable transactions, the Form requires the filing party to provide:

(a) the specific transaction or the series of transactions that was designated by the Minister to which the notifiable transaction is the same or substantially similar;

(b) whether the notifiable transaction is the same as a transaction (or series) designated by the Minister, or substantially similar to a transaction (or series) designated by the Minister;

(c) the year the tax benefit (based on the tax treatment) is expected to be used; and

(d) the filing party's description of the reason they are disclosing the notifiable transaction regarding the designated transaction or series of transactions to which the notifiable transaction at issue is the same or substantially similar.[42]

F. PROTECTION FOR SOLICITOR-CLIENT PRIVILEGE

48. The New Legislation provides that information does not have to be disclosed "if it is reasonable to believe that the information is subject to solicitor client privilege."[43]

49. However, it is also clear that the government still expects legal professionals to disclose confidential client information. In explanatory notes published in 2022, the Minister of Finance stated that despite the privilege exemption, a lawyer "would nevertheless be expected to provide information for which solicitor-client privilege does not exist."[44]

G. PROCEDURAL HISTORY AND NATURE OF RELIEF SOUGHT

50. The Federation has voiced its concerns with the mandatory disclosure rules multiple times. As discussed above, as early as 2010 the Federation made submissions to the Minister of

[41] Colborne Affidavit, Exhibit C (p. 59)

[42] Colborne Affidavit, Exhibit C (p. 34)

[43] New Legislation, ss. 237.3(17), 237.4(18)

[44] Colborne Affidavit, para. 49, Exhibit D

Finance, the Department of Finance, and the Senate Standing Committee on National Finance asking that legal professionals be removed from a mandatory reporting scheme.[45] The Federation's concerns have gone unanswered.[46]

51. The first possible reporting deadline under the New Legislation was September 21, 2023. Given the lack of engagement from the government with respect to its concerns, the Federation filed a petition seeking a declaration of constitutional invalidity on September 11, 2023. It also advised the Attorney General that it intended to seek urgent injunctive relief.

52. Upon receipt of the Federation's materials, the Attorney General consented to an interim injunction until the earlier of the release of this Court's decision on the Federation's injunction application or November 20, 2023 (the "**Consent Order**").[47] The Consent Order provides that:

(a) By consent of the parties, legal professionals, including lawyers and articling students in all provinces and territories of Canada, notaries in Quebec, and paralegals in Ontario, are exempt from the application of section 237.3 and section 237.4 of the Income Tax Act, R.S.C. 1985, c. 1 until the earlier of:

the release of this Court's decision on the relief sought in the Notice of Application of the Federation dated September 11, 2023, or

November 20, 2023.

(b) By consent of the parties, the Federation and the Attorney General of Canada accept this order as nationally binding, i.e. as if it had been made by a Court of competent jurisdiction in each province and territory of Canada.

53. On this application, the Federation merely seeks to extend the duration of the Consent Order until the release of this Court's reasons on the merits of the Federation's constitutional challenge.

54. The Federation is willing to work with the Attorney General to have the petition heard expediently so that the injunctive relief sought at this hearing will be for a short duration.

[45] Perry Affidavit, paras. 33-36

[46] Perry Affidavit, para. 37

[47] Order of Justice Murray granted September 14, 2023

III. ISSUES

50. The issue before the Court is whether the existing injunctive relief should be continued pending the hearing of the Federation's petition on the constitutionality of the New Legislation. This requires the Court to determine:

(a) Is there a serious issue as to whether the application of the mandatory disclosure rules in the New Legislation to legal professionals infringes sections 7 and 8 of the *Charter*?

(b) Will irreparable harm be suffered if an interlocutory exemption of legal professionals from the New Legislation is not granted pending the determination of constitutional validity?

(c) Does the balance of convenience favour granting an interlocutory exemption pending the hearing of the petition?[48]

51. In the Federation's submission, there are clear and compelling reasons why each of these issues are to be answered in the affirmative and an interlocutory injunction should be granted.

IV. LAW AND ARGUMENT

A. THE TEST FOR INJUNCTIVE RELIEF

52. In all instances where injunctive relief in sought, the fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific.[49]

---

[48] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117 [*RJR*]; see also *Harper v. Canada (Attorney General)*, 2000 SCC 57, and *Metropolitan Stores (MTS) Ltd v. Manitoba Food and Commercial Workers, Local 832* (1985), 37 Man R. (2d) 181 (S.C.C.) [*Metropolitan Stores*]

[49] *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, para. 25

53. While not granted lightly,[50] interim injunctive relief pending a determination of constitutional validity has been granted in a number of cases by this Court and others across the country.[51]

54. In constitutional cases there is an important distinction between an interlocutory injunctive order that (i) *suspends* the application of legislation to everyone and (ii) one that merely *exempts* a specified category of persons from the application of the legislation. The Supreme Court of Canada has repeatedly observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case.[52]

55. In this case, the Federation only seeks to continue the existing exemption for legal professionals from the requirements under sections 273.3 and 273.4 of the *ITA* under the Consent Order until the constitutionality of those provisions is determined by this Court. The New Legislation will continue to apply to all taxpayers, and all advisors other than legal professionals.

---

[50] *PCA Injunction Decision*, para. 57

[51] See for example: *Cambie Surgeries Corporation v British Columbia (Attorney General)*, 2018 BCSC 2084, leave to appeal ref'd 2019 BCCA 29 [*Cambie Surgeries*] (Injunction granted enjoining the enforcement of financial penalties under the *Medicare Protection Act,* which prohibited the provision of private healthcare, pending determination of constitutional challenge); *True North Disability Services Ltd. v Canada (National Revenue)*, 2021 BCSC 2142 [*True North*] (Injunction granted suspending the operation of the *Disability Tax Credit Promoters Restrictions Regulations*, which imposed a limit on the fees that could be charged by a person who makes a disability tax credit request under the *Income Tax Act* on behalf of a claimant); *R. v. Oughtred*, 2013 BCSC 1821 (Stays of driving prohibitions issued to motorists pending the hearing of a petition challenging the constitutionality of the immediate driving prohibition legislation); *Québec (Procureur général) c. Canada (Procureur général)*, 2012 QCCS 1614 (injunction preventing the destruction of records in the Canadian Firearms Registry, pending determination of the constitutionality of federal legislation mandating that the records be destroyed.); *Wynberg v. Ontario*, 2004 CarswellOnt 1021 (Injunction requiring Ontario to provide interim funding for treatment of children with autism while the parents' challenge to the constitutionality of Ontario's autism treatment funding regime was pending.); *Procureur général du Québec c. Quebec English School Board Association*, 2020 QCCA 1171 (Injunction suspending legislation reforming Quebec's school board governance model from applying to Quebec's English school boards [*Quebec School Board Association*]); *Conseil Scholaire Fransaskois v. Saskatchewan*, 2014 SKQB 285 (Injunction requiring Saskatchewan to provide funding to the province's French school board pending a declaration defining Saskatchewan's obligation to provide funding to the board pursuant to s. 23 of the Charter); *Rogers v. Greater Sudbury (City) Administrator of Ontario Works*, 2001 CarswellOnt 1987 (Interlocutory declaration that the applicant was constitutionally exempted from the application of regulations under the *Ontario Works Act,* which had the effect of cancelling the applicant's "Ontario Works" benefit due to a prior conviction for welfare fraud.).

[52] *RJR*, para. 73; *Metropolitan Stores,* para. 83

B. THERE IS A SERIOUS ISSUE TO BE TRIED

56. The first stage of the test for injunctive relief—determining whether there is a serious question to be tried—imposes a low threshold. An extensive examination of the merits is not required. If the court is satisfied that the application is neither frivolous nor vexatious, it should proceed to consider the second and third elements of the test, "even if of the opinion that the plaintiff is unlikely to succeed at trial."[53]

57. In its Application Response the Attorney General concedes that there is a serious issue to be tried.[54] This is an appropriate concession. In order to adjudicate the remainder of the application, however, it is important for the Court to understand why there is a serious issue to be tried and what that issue is. The following sections address these points.

(1) The Prior Proceeds of Crime Act Litigation

58. The issues before the Court in this case are similar to the issues before this Court, and eventually the Supreme Court of Canada, in *Canada (AG) v. Federation of Law Societies*.[55]

59. In 2001, the Federation and the Law Society of British Columbia (the "**LSBC**") filed a petition challenging the constitutionality of certain provisions of what is now the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*[56] and related regulations (the "***PCTFA***", and formerly, the *Proceeds of Crime Act*, or the "***PCA***"). Under the *PCA*, lawyers were required to report to the federal government certain client transactions.

60. Then, as now, the Federation sought interlocutory injunctive relief pending the hearing of the petition. This Court granted an interlocutory injunction exempting legal counsel from the operation of the *PCA* until the legal challenge to its constitutional validity could be determined.

---

[53] *RJR,* para. 55

[54] Application Response, Part 5, para. 7

[55] *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 [*PCA SCC Decision*]; *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2013 BCCA 147 [*PCA BCCA Decision*]; *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2011 BCSC 1270 [*PCA BCSC Decision*]

[56] S.C. 2000, c.17

That order was upheld by the Court of Appeal.[57] Similar orders were granted in Ontario,[58] Saskatchewan,[59] Nova Scotia,[60] and Alberta.[61] As discussed below, the relief sought on this application is largely the same as the relief granted by this Court with respect to the *PCA*.

61. Following the granting of interlocutory injunctive relief exempting legal professionals from the *PCA*, the Attorney General agreed that the litigation in this province would serve as a test case across Canada. The Attorney General also consented to interlocutory injunctions on the same terms as the relief granted by this Court in all remaining provinces and territories where injunctions had not yet been granted.[62] The *PCA* was subsequently amended and the provisions requiring lawyers to report on their clients repealed.

62. In 2008, Parliament amended the *PCTFA* to place new recording and related obligations on legal professionals. The Federation and LSBC challenged the constitutionality of the amended *PCTFA*.

63. In 2010, the Attorney General agreed to a consent order exempting legal professionals and law firms from the applicable provisions of the *PCTFA* pending a decision on the merits of the constitutional challenge, retroactive to 2008 and including all appeals.[63]

64. In 2011, this Court found that the impugned provisions of the *PCTFA* that required lawyers to record information with respect to their clients and surrender that information to inspection infringed section 7 of the *Charter* and were unconstitutional.[64] This decision was upheld by the Court of Appeal.[65]

65. As discussed below, at the Supreme Court of Canada, Justice Cromwell (writing for the majority) concluded that the *PCTFA* violated both sections 7 and 8 of the *Charter*. In doing so,

---

[57] *Law Society of British Columbia v. Canada (Attorney General)*, 2002 BCCA 49

[58] *Federation of Law Societies of Canada v. Canada (Attorney General)* (2002), 207 D.L.R. (4th) 740 (Ont. S.C.J.)

[59] *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2002 SKQB 153

[60] *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2002 NSSC 95

[61] *Federation of Law Societies of Canada v. Canada (Attorney General)*, [2001] A.J. No. 1697 (A.B.K.B.)

[62] Perry Affidavit, para. 22, Exhibit “D” (Order of Chief Justice Brenner, May 13, 2005)

[63] *PCA BCSC Decision,* para. 41

[64] *PCA BCSC Decision*

[65] *PCA BCCA Decision*

Justice Cromwell found that the lawyer's duty of commitment to their client's cause is a constitutionally protected principle of fundamental justice.[66] Legislation that compromises this duty in favour of the state is unconstitutional.

66. The New Legislation is fundamentally inconsistent with this key principle.

(2) The *ITA* Mandatory Disclosure Rules Violate Section 7

(a) Key Constitutional Principles

67. A party alleging a breach of section 7 of the *Charter* must demonstrate that (1) the legislation interferes with their life, liberty, or security, and (2) that deprivation is not in accordance with the principles of fundamental justice.[67]

68. For the purpose of section 7, a law that imposes a potential penalty of imprisonment constitutes a threat to individual liberty.[68]

69. In the *PCA SCC Decision*, the Supreme Court of Canada established that the lawyer's duty of commitment to the client's cause is a principle of fundamental justice that requires constitutional protection against government intrusion.

70. At the core of this principle is the fact that a client must be able to place "unrestricted and unbounded confidence" in their counsel.[69] The sanctity of the relationship between solicitor and client is integral to the workings of the legal system and the administration of justice.[70] Justice Cromwell held that:

> [96] Clients — and the broader public — must justifiably feel confident that lawyers are committed to serving their clients' legitimate interests free of other obligations that might interfere with that duty. Otherwise, the lawyer's ability to do so may be compromised and the trust and confidence necessary for the solicitor-client relationship may be undermined. This duty of commitment to the client's cause is an enduring principle that is essential to the integrity of the administration of justice.

---

[66] *PCA SCC Decision,* para. 109

[67] *Carter v. Canada (Attorney General)*, 2015 SCC 5, para. 55

[68] *PCA SCC Decision*, para. 71; *R v. Malmo-Levine*, 2003 SCC 74, para. 84

[69] *PCA SCC Decision*, para. 83

[70] *PCA SCC Decision,* paras. 82-83

…

> [97] The duty of commitment to the client's cause is thus not only concerned with justice for individual clients but is also deemed essential to maintaining public confidence in the administration of justice. Public confidence depends not only on fact but also on reasonable perception. It follows that we must be concerned not only with whether the duty is in fact interfered with but also with the perception of a reasonable person, fully apprised of the relevant circumstances and having thought the matter through. The fundamentality of this duty of commitment is supported by many more general and broadly expressed pronouncements about the central importance to the legal system of lawyers being free from government interference in discharging their duties to their clients.
>
> …
>
> [103] The duty of commitment to the client's cause ensures that "divided loyalty does not cause the lawyer to 'soft peddle' his or her [representation]" and prevents the solicitor-client relationship from being undermined [citations omitted]. In the context of state action engaging s. 7 of the *Charter*, this means at least that (subject to justification) the state cannot impose duties on lawyers that undermine the lawyer's compliance with that duty, either in fact or in the perception of a reasonable person, fully apprised of all of the relevant circumstances and having thought the matter through. The paradigm case of such interference would be state-imposed duties on lawyers that conflict with or otherwise undermine compliance with the lawyer's duty of commitment to serving the client's legitimate interests.

(b) The New Legislation Interferes with Legal Professionals' Liberty Interests

71. 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*).[71]

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

(c) This Interference is Not in Accordance with the Principles of Fundamental Justice

73. The New Legislation conflicts with the principle of fundamental justice of the lawyer's duty of commitment to the client's cause.

[71] Colborne Affidavit, para. 42

74. Requiring legal professionals to assist the CRA in its investigation and potential prosecution of the legal professionals' clients is fundamentally antithetical to counsel's independence and role as trusted advisor. 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* (or, similarly, those found in the *Model Code of Professional Conduct* published by the Federation).

75. The Supreme Court of Canada has described professional codes of conduct and the ethical standards they contain as "evidence of a strong consensus in the profession as to what ethical practice and fulfilment of the public interest requires".[72] These codes of conduct capture the broad duties of good faith and loyalty that are owed to clients by legal professionals in their fiduciary role. Commitment to the client's cause is a key element of ethical conduct and at the core of the public interest in the availability of independent, loyal legal advice.

76. While the New Legislation creates significant issues for legal professionals, as described below, it is the protection of the public interest that is the driving factor behind the ethical obligations placed on lawyers in the BC Code. It is also the reason that a lawyer's commitment to their client's cause has been recognized as a constitutionally protected principle of fundamental justice. As an organization charged with protection of the public interest, the Federation's paramount concern with the New Legislation is that it will irreparably damage the solicitor-client relationship to the detriment of the public good.

(i) Disclosure of Confidential Client Information

77. A lawyer has a duty to keep client information confidential and not to use or disclose a client's confidential information to the detriment of the client or benefit of the lawyer without consent.[73] This duty is broader than the ambit of solicitor-client privilege and extends, for example, to the fact that a lawyer was retained or consulted by a client about a matter.[74]

78. The rationale underlying this duty is the need for open and unbridled dialogue between clients and legal professionals.[75] As set out in the BC Code, "a lawyer cannot render effective

[72] *PCA SCC Decision,* para. 108

[73] BC Code 3.3-1, 3.3-2

[74] Colborne Affidavit, para. 70; BC Code 3.3-1 and commentary

[75] *PCA SCC Decision*, para. 83

professional service to a client unless there is full and unreserved communication between them."[76]

79. There is no question that under the New Legislation legal professionals will be required to disclose information to the CRA that is subject to this broad duty of confidentiality.

80. Requiring legal professionals to report confidential client information to the government violates the sanctity of the lawyer-client relationship and is not in accordance with the duty of commitment to the client's cause. It will also require lawyers to breach their ethical obligations under the BC Code.

81. It remains unclear exactly what information the government expects legal professionals to disclose. However, the contents of the Form (summarized at paragraphs 45-47 above), which legal professionals will be required to submit, demonstrates that the government is seeking disclosure of a significant amount of substantive information from legal professionals.

82. In particular, the Form solicits the filing party's opinion on multiple issues that require qualitative legal analysis and treads into issues on which legal professionals advise their clients.[77]

83. The Form for a reportable transaction will require lawyers to identify themselves as counsel to their clients, describe the transaction in issue, identify which of the "hallmarks" they believe apply, describe the nature of the tax benefit sought, and provide details of the transaction along with any other steps that are anticipated to occur.[78]

84. In the case of a notifiable transaction, the Form solicits the filing party's legal analysis regarding the notifiable transaction by requiring the filing party to describe the reason they are disclosing the notifiable transaction (i.e., the legal basis for the party's duty to report). This requires the filing party's legal analysis of i) why the transaction meets the criteria for a notifiable transaction, and ii) why the filing party has a duty to report the notifiable transaction (e.g., they were an advisor on the transaction).

---

[76] BC Code 3.3-1

[77] Colborne Affidavit, para. 73. See also Jack Silverson "Impact of the Mandatory Disclosure Rules on the Relationship Between Tax Lawyers and Clients" (2023) 4:3 Perspectives on Tax L & Pol'y 9

[78] Colborne Affidavit, Exhibit C (p. 34-35)

85. Many of these points are issues that require substantive legal analysis and are likely to be topics upon which legal professionals will have advised their clients. Ultimately, under this "dual reporting" scheme, the CRA is seeking to look into lawyers' files and obtain information about their clients to use against them. Once this confidential information has been disclosed, the CRA is at liberty to use the legal professional's knowledge of the transaction to audit the completeness and accuracy of the returns submitted by taxpayers and other advisors on the transaction, and potentially prosecute the taxpayer and other advisors and promoters.[79]

86. There is no certainty that legal professionals will be able to obtain client consent in time or that their clients will agree to disclosure. Moreover, the fact that disclosure is "required by law", as the Attorney General argues in paragraph 17 of its Application Response, does not mitigate the violation of legal professionals' duties to their client. It just means that legal professionals will be aware that, but for an injunction they will be required to divulge confidential client information. This is the very reason an injunction is required.

87. The requirement imposed upon legal professionals to report confidential information with respect to their client's affairs to the CRA will discourage frank disclosure of information by clients to their counsel and significantly impair the solicitor-client relationship.[80] This was essentially the grounds upon which this Court granted an injunction exempting legal professionals from the *PCA* in 2001.[81]

(ii) An Irreconcilable Conflict of Interest

88. The New Legislation also threatens legal professionals' ability to act with undivided loyalty to their clients, another fundamental aspect of the solicitor-client relationship.

89. A lawyer must not act where there is a conflict of interest, which exists wherever there is a substantial risk that a lawyer's duty to their client could be materially adversely affected by their own interests.[82] The mandatory disclosure rules in the New Legislation create multiple conflicts between the interests of legal professionals and those of their clients.

---

[79] *R v. Jarvis*, 2002 SCC 73

[80] Perry Affidavit, paras. 38, 40

[81] *PCA Injunction Decision*, para. 78

[82] BC Code 3.4-1

(iii) Conflict Created by Uncertainty of Reporting Obligations

90. Legal professionals will be in a conflict of interest wherever they are uncertain of their obligation to report a transaction or uncertain of what the content of that report should be. This uncertainty will result from, among others, the following issues and ambiguities in the New Legislation:

(a) The definitions of what constitutes a reportable or notifiable transaction can (and, with respect to a notifiable transaction, must)[83] be interpreted broadly. For example, with respect to a reportable transaction, a legal professional will have to determine whether "one of the main purposes of the transaction" is to obtain a tax benefit. This is a lower standard than was applied previously and is lower than the general threshold found in the GAAR (which continues to use "primary purpose" standard). This will require legal judgment, factual knowledge of all aspects of the transaction, and tax law expertise.[84] Even determining whether a transaction results in a tax benefit is in and of itself a complicated exercise.[85]

With respect to a notifiable transaction, a legal professional will have to determine whether the transaction in issue is "substantially similar" to a type of transaction that has been deemed notifiable, including by considering the tax consequences and tax strategy of the transaction.[86] This is also an analysis that requires tax expertise and on which legal professionals, other advisors, promoters, and clients may reasonably disagree.[87]

(b) There is also a broad definition of "advisor" in the New Legislation. It includes any legal professional who provides advice or assistance with respect to developing or implementing a transaction.[88] Complex transactions often involve a wide range of legal professionals.[89] All of these legal professionals will have to make a qualitative

---

[83] *ITA*, s. 237.4

[84] Colborne Affidavit, paras. 54-56

[85] Colborne Affidavit, paras. 54-56

[86] Colborne Affidavit, para. 57

[87] Colborne Affidavit, para. 61

[88] Colborne Affidavit, para. 19

[89] Colborne Affidavit, paras. 64-65

analysis of whether a client transaction must be reported to the CRA, regardless of their degree of involvement with the transaction.

(c) Given this potential for ambiguity and differing legal views, legal professionals and their clients may disagree as to whether a transaction must be reported. Legal professionals may also simply be unsure as to whether a transaction needs to be reported.

91. In all of these situations, the significant penalties and potential imprisonment that legal professionals face if they fail to report when required will incentivize legal professionals to err on the side of reporting a transaction. This may well conflict with their client's interests in not having the CRA investigate the transaction on the basis of the legal professionals' report. When faced with this conflict, the legal professional will have to decide whether to:

(a) report, breach the client's confidence and instructions and face civil suit by the client and potential disciplinary action by the law society; or

(b) refuse to report, and face potential fines and imprisonment by the government. [90]

92. Neither option enables the legal professional to act in the client's interests without damaging their own.

(iv) Conflict with Use of Privileged Information

93. In the unfortunate situation where a legal professional does not file a return for a reportable or notifiable transaction and is penalized by the CRA, the natural source of information for the legal professional to defend themselves will be their client file.[91] This will include correspondence where the legal professional seeks information from their client regarding the nature of the transaction or any other information relevant to determining if the transaction should be reported.[92] This information is protected by solicitor-client privilege. [93] The legal professional can ask their client to waive privilege over this information to allow the legal professional to make their defence, but the client may well refuse (particularly as it may not be in their interests to waive privilege and

[90] Colborne Affidavit, para. 76

[91] Colborne Affidavit, para. 95

[92] Colborne Affidavit, para. 95

[93] Colborne Affidavit, para. 95

have their affairs exposed to the CRA).[94] A lawyer will then have to decide whether to advance a complete defence by seeking to rely on privileged information (in flagrant breach of their duties to their client) or advance an incomplete defence that does not include critical evidence of their innocence.

94. Under the BC Code, a lawyer also has an obligation to claim privilege over a potentially privileged document or piece of information (regardless of their view on privilege) unless they have instructions from their client to the contrary.[95] There is no mechanism in the New Legislation to resolve a dispute about privilege as between a lawyer and client when it comes to whether a transaction must be reported, again creating potential conflict between the lawyer's interests and their client's.

(3) Violation of Section 8 of the Charter

(a) Key Constitutional Principles

95. Section 8 of the *Charter* protects against unreasonable search and seizure.

96. 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.[96] When applying section 8, courts have repeatedly emphasized the high protection placed on information provided to legal professionals, which can only be interfered with where absolutely necessary.

(b) The *Chambre* Decision

97. The magnitude and breadth of the protection provided for information disclosed to legal professionals by their clients is set out clearly in the Supreme Court of Canada's decision in *Canada (Attorney General) v Chambre des notaires du Québec*, following a number of prior Supreme Court cases on the topic.[97]

---

[94] Colborne Affidavit, para. 95

[95] BC Code, Rule 3.3-2.1

[96] *R v Tessling*, 2004 SCC 67, para. 18; *R v Shepherd*, 2009 SCC 35, para. 15

[97] *Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20 [*Chambre*]

98. In the *Chambre* case, the Supreme Court of Canada concluded that provisions of the *ITA* that required lawyers to report confidential information about their clients to the CRA violated section 8 of the *Charter*.

99. While a section 8 analysis normally considers both the importance of the state objective in issue and the degree of impact on an individual's privacy interest, the Court in *Chambre* determined that this balancing act is not useful when the information at issue is subject to solicitor-client privilege.[98] This is because solicitor-client privilege is a rule that has "deep significance and a unique status in our legal system".[99] It "should not be interfered with unless absolutely necessary given that it must remain as close to absolute as possible."[100] A client's expectation of privacy is at its highest with respect to information subject to solicitor-client privilege. The Court found that any legislative provision that interferes with solicitor-client privilege "more than is absolutely necessary will be labelled unreasonable".[101]

100. The Court in *Chambre* also confirmed that the significant protection accorded to information provided to a legal professional by their client is unaffected by the context in which that information is provided or sought, including in the context of an investigation of a taxpayer by the CRA (as was the case there). The Court stated that:

> [39] Thus, where professional secrecy is in issue, what matters is not the context in which a privileged document or privileged information could be disclosed to the state, but rather the fact that the document or information in question is privileged. It is important that a client consulting a legal adviser feel confident that there is little danger that information or documents shared by the client will be disclosed in the future regardless of whether the consultation takes place in the context of an administrative, penal or criminal investigation: "The lawyer's obligation of confidentiality is necessary to preserve the fundamental relationship of trust between lawyers and clients" (*Foster Wheeler*, at para. 34).[102]

---

[98] *Chambre,* paras. 37-38

[99] *Chambre*, para. 28

[100] *Chambre,* para. 28

[101] *Chambre*, paras. 28, 33, 38; see also *Lavallee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink*, 2002 SCC 61 [*Lavallee*], paras. 63-69; *Maranda v. Richer*, 2003 SCC 67, para. 37

[102] *Chambre*, para. 39

101. The Court ultimately concluded that the impugned provisions of the *ITA* constituted an unnecessary and unreasonable intrusion into solicitor-client privilege and were therefore unconstitutional.

(c) The Mandatory Disclosure Rules are an Unreasonable Seizure of Client Information

102. As was the case in *Chambre,* the mandatory disclosure rules in the New Legislation that require legal professionals to report client information to the CRA are an unreasonable intrusion on the client's extremely high right of privacy with respect to that information.

(i) Use of Confidential Information

103. The Court in *Chambre* is clear that a client's reasonable expectation of privacy is high with respect to all information provided to their counsel. The Court stated that it is "well established that a client of a notary or a lawyer has a reasonable expectation of privacy for information and documents that are in the possession of the notary or the lawyer…which constitute information the lawyer is ethically required to keep confidential."[103]

104. As discussed in paragraphs 77-87 above, the New Legislation requires legal professionals to disclose confidential client information to the CRA. This information can then be used against their client by the CRA and may result in the client becoming subject to investigation, regulatory penalties, reassessment, sanctions, and potential imprisonment.

105. Irrespective of issues of solicitor-client privilege, discussed below, there is a serious question to be tried as to whether the required disclosure of client information under the New Legislation violates section 8.

(ii) Loss of Solicitor-Client Privilege

106. The New Legislation does not sufficiently protect information subject to solicitor-client privilege. The most stringent standards must be adopted to protect information subject to solicitor-client privilege. This is because once solicitor-client privilege is lost, there is no way to recover it.[104]

---

[103] *Chambre*, para. 35, citing *Lavallee,* para. 35

[104] *Chambre*, para. 57

107. As is discussed above, solicitor-client privilege is unreasonably threatened by the New Legislation.[105] The threats to solicitor-client privilege discussed in the context of section 7 above also engage a section 8 analysis. In *Chambre*, the Court held as follows:

> [56] Finally, the possibility of being prosecuted (under s. 238 of the *ITA*) for failing to provide the CRA with the information it seeks could influence the choice made by a notary or a lawyer to comply or not to comply with a requirement. The threat of prosecution in fact creates a conflict of interests between legal advisers and their clients, pitting the duty of confidentiality owed by legal advisers to their clients against their statutory duty of disclosure to the tax authorities (*Lavallee*, at para. 40). In this regard, it is, contrary to the AGC's argument, irrelevant that none of the notaries who received requirements have so far been prosecuted for refusing to provide the information or documents being sought. The mere possibility of being so prosecuted under the ITA places those legal advisers in an intolerable situation. For the purposes of determining whether the seizure is unreasonable within the meaning of s. 8 and analyzing the scheme's constitutional defects in relation to notaries and lawyers and the protected information they have in their possession, this is sufficient.[106]

108. The Court in *Chambre* concluded that the legislation in issue unreasonably required legal professionals to choose between the obligations placed on them under the legislation and safeguarding their clients' privileged information against seizure by the government. This is also the case here.

109. Contrary to the position taken by the Attorney General in its Application Response, questions of solicitor-client privilege can be complicated and legal professionals and their clients will not always agree.[107] As the Court held in *Chambre*, the line of solicitor-client privilege can be difficult to draw.[108]

110. It is also inherent in the nature of legal practice that practitioners may make incorrect decisions as to whether information is subject to solicitor-client privilege.[109] There is a clear possibility that a legal professional may make an incorrect (or allegedly incorrect) assessment of the existence of solicitor-client privilege when considering their obligations under the New

---

[105] See paragraphs 77-94 above; see also Élisabeth Robichaud & Marie-Emmanuelle Vaillancourt, "Impact of the Mandatory Disclosure Rules on the Relationship Between Tax Lawyers and Clients" (2023) 4:3 Perspectives on Tax L & Pol'y 11

[106] *Chambre*, para. 56

[107] Application Response, para. 16; *Chambre,* para. 50

[108] *Chambre*, para. 40

[109] *Chambre,* para. 55

Legislation and disclose information to the CRA on that basis. Once this has occurred, privilege will be waived and the CRA can use that information against the client.

(iii) The Infringement of Solicitor-Client Privilege in the New Legislation is Unnecessary

111. Given its unique status, any justifiable infringement of solicitor-client privilege must be absolutely necessary. The New Legislation does not meet this high threshold. There are a significant number of other sources of information available to the CRA with respect to reportable and notifiable transactions, being the taxpayers, other advisors (such as accountants) and promoters, all of whom will remain subject to the reporting requirements in the New Legislation regardless of the interlocutory order sought.

112. This lack of necessity is most evident in the stated purpose of the New Legislation in the 2021 Budget. The 2021 Budget indicates that the government has sought to adopt a "dual reporting system" to "reduce the risk of inadequate disclosure" because a taxpayer's disclosure can be "checked" against the legal professionals' disclosure to assess whether the information provided is accurate and complete.[110] This is an inadequate justification for intrusion into the sanctity of the solicitor-client relationship.

113. The overbroad nature of the New Legislation is also evident when other international regimes are considered. Mandatory disclosure regimes in many foreign jurisdictions are narrower in scope than the New Legislation and recognize the unique status of legal professionals. [111]

114. For example, under the United Kingdom's mandatory disclosure regime, if a "promoter" (which includes a lawyer) can claim legal professional privilege in respect of <u>any</u> information they are required to report, the promoter is relieved of their reporting obligation entirely.[112] The reporting obligation is then placed solely on the client, unless there is another promoter (who is not able to make a clam of privilege) who has an obligation to disclose the transaction.[113] The

[110] See paragraph 21 above

[111] See generally, Éric Hamelin & Lyne Latulippe "Adopting and Designing Mandatory Disclosure Rules: A Choice of Tax Policy" (2023) 4:3 Perspectives on Tax L & Pol'y 15.

[112] *Finance Act 2004* (UK) ("***UK Finance Act***"), s 314; *The Tax Avoidance Schemes (Promoters and Prescribed Circumstances) Regulations 2004* (UK), SI 2004/1865 ("***UK Promoters Regulation***"), s. 6

[113] *UK Finance Act*, s. 310; United Kingdom, HM Revenue & Customs, *Disclosure of tax avoidance schemes: guidance*, last updated 16 June 2022, at section 3.11 online:

client may choose to waive privilege, in which case the reporting obligation is returned to the legal professional.[114]

115. In addition to recognizing the unique status of legal professionals, the United Kingdom's regime is also more targeted than the New Legislation in whom it deems a "promoter". For example, under the UK regime:

(a) A person can only be a promoter if they are in the business of providing tax services or are a bank or securities house.[115]

(b) A person is not a promoter of a transaction if they are in the business of providing tax services and are responsible for the design of some aspect of the transaction, but they do not provide tax advice in relation to the transaction.[116]

(c) A person is not a promoter if they provide tax advice in relation to the transaction but are not responsible for the design of any element of the transaction from which the tax advantage expected to be obtained arises.[117]

(d) A person is not a promoter if they are not responsible for the design of all elements of the proposed transaction from which the tax advantage expected to be obtained arises and could not reasonably be expected to have sufficient information to i) assess whether they have a reporting obligation or ii) to comply with that reporting obligation.[118]

116. Academic commentary suggests that the United Kingdom's targeted approach to mandatory reporting has been effective.[119]

117. The European Court of Justice has also found that similar mandatory disclosure legislation with respect to cross-border transactions violates the Charter on Fundamental Rights of the

---

<https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance/disclosure-of-tax-avoidance-schemes>

[114] *UK Finance Act*, s. 310

[115] *UK Finance Act*, s. 307(1) and (2)

[116] *UK Finance Act*, s. 307(5); *UK Promoters Regulation*, s. 4(1) and (3)

[117] *UK Finance Act*, s. 307(5); *UK Promoters Regulation*, s. 4(1) and (2)

[118] *UK Finance Act*, s. 307(5); *UK Promoters Regulation*, s. 4(1) and (4)

[119] Hamelin & Latulippe, pg. 16

European Union by unjustifiably interfering with the right to respect for communications between lawyers and their clients.[120]

118. This brief review of comparable international legislation, addressing the same topic as the New Legislation, demonstrates that the broad rules in the New Legislation are not "absolutely necessary".

C. IRREPARABLE HARM

(1) Key Legal Principles

119. The second part of the injunction test considers whether irreparable harm will be suffered if the injunction is not granted.

120. Harm is "irreparable" if it is incapable of being adequately remedied in damages, either because the nature of the harm is such that it cannot be quantified in monetary terms or because damages are not available.[121] The concept of irreparable harm refers to the nature of the harm in question, not the magnitude. Proof of irreparable harm is not required—doubt concerning the adequacy of damages is sufficient.[122] An applicant for injunctive relief does not have to prove that irreparable harm will occur, just that there is a risk that it will.[123]

121. This Court has recently questioned the importance of irreparable harm in granting injunctive relief in constitutional cases. In *Cambie Surgeries*, the Court opined that an irreparable harm analysis is complicated by the public interest nature of constitutional litigation and "may be ill-suited to a comparable assessment of harm in the private law context".[124] It concluded that the application for interlocutory relief before it ought not to be determined on the question of

---

[120] Case C-694/20, *Orde van Vlaamse Balies and Others v Vlaamse Regering* [2022] OJC

[121] *RJR* at 341. Harm may be irreparable where it is financial in nature if there is no clear avenue available for seeking financial compensation.[121] For example, in *RJR-MacDonald,* monetary loss was held to constitute irreparable harm in light of the uncertain state of the law regarding an award of damages for constitutional breaches.

[122] *New Beginnings Early Learning (White Rock) Ltd. v CEFA Systems Inc*., 2018 BCSC 2417, para. 11; *British Columbia (Attorney General) v. Wale*, 1986 CanLII 171 (B.C.C.A.), [1987] 2 W.W.R. 331, aff'd 1991 CanLII 109 (SCC), [1991] 1 S.C.R. 62, para. 50

[123] *FS Insurance Brokers, Inc. v. Insurance Council of British Columbia*, 2023 BCSC 1190, para. 81

[124] *Cambie Surgeries*, para. 166

irreparable harm.[125] In any event, the Federation has provided ample evidence on this application to prove irreparable harm.

(2) Irreparable Harm to the Solicitor-Client Relationship Will Occur

122. For the reasons discussed in paragraphs 77-87 above, requiring legal professionals to disclose client information pending the hearing of the Federation's petition will cause significant damage to the public's perception of the solicitor-client relationship.

123. As is set out in the affidavit of Jill Perry, the Federation's president, if injunctive relief is not granted, "the public confidence and perception of the independence of the bar will be harmed", and "the public's trust in legal professionals and the administration of justice will be permanently injured."[126]

124. When this Court granted the Federation's application for injunctive relief in the challenge to the *PCA*, it concluded that "the public's confidence in an independent bar will have been shaken and the lawyer-client relationship will be irrevocably damaged" if lawyers were required to report on their clients pending a determination of constitutional validity. [127] This conclusion satisfied the threshold of irreparable harm under the *RJR* test.[128]

125. This is exactly the case here. It is clear from the responsive materials filed by the Attorney General on this application that the government intends to use the obligations placed on legal professionals under the New Legislation "to assist the Minister in collecting information."[129] There is no doubt that this will harm the public confidence in the independence of legal professionals—they are being conscripted to assist the government in collecting information about their clients to be used against them.

126. The Supreme Court of Canada has already held that this type of activity is forbidden. Lawyers' files must not be "turned into archives for the use of the prosecution."[130]

---

[125] *Cambie Surgeries*, para. 124

[126] Perry Affidavit, para. 40

[127] *PCA Injunction Decision*, para. 82

[128] *PCA Injunction Decision,* para. 82

[129] Application Response, Part 4 para. 2

[130] *Maranda,* para. 37

127. Irreparable harm will also occur if individual clients have confidential or privileged information improperly disclosed to the CRA in the interim period. As the Supreme Court said in *Chambre*, "once professional secrecy is lost, there is no way to recover it."[131] The potential for this damage to occur is clear, and it cannot be undone. The potential for disclosure of confidential and privileged information will cause a "chilling effect" on clients' ability to consult with their lawyers fully and freely.[132]

128. Enforcement of the New Legislation against legal professionals prior to the hearing of the petition may also result in reduced accessibility of legal services to the public. Due to the issues identified above, legal professionals may decline to act on a transaction that is potentially reportable and clients seeking legal advice on various aspects of transactions may find it difficult to obtain legal services.[133]

129. The Attorney General claims no irreparable harm will occur if injunctive relief is not granted because "the same information must be provided by the legal professional's client and other persons involved with the transaction"—meaning the information that legal professionals and their clients submit will be identical.[134]

130. This position is irreconcilable with the Attorney General's claim that it requires the information submitted by legal professionals to collect information on reportable or notifiable transactions. Either the information provided by legal professionals will be the same as that submitted by taxpayers, other advisors, and promoters, in which case it is redundant; or it will be different, in which case it amounts to an attempt by the government to reach into legal professionals' files, which must be prevented pending the hearing of the Federation's petition. Further, if the Attorney General's claim that the CRA is only seeking identical information from taxpayers and legal professionals is accurate, this practically means that reports filed by legal professionals will only be of use to the CRA in a situation where the taxpayer does not report (or reports inadequately). This means the only use the CRA will make of the reports filed by legal professionals will be to act against the legal professionals' clients.

---

[131] *Chambre,* para. 57

[132] Perry Affidavit, para. 40

[133] Colborne Affidavit, para. 91

[134] Application Response, Part 5, para. 18

D. THE BALANCE OF CONVENIENCE FAVOURS INJUNCTIVE RELIEF

131. Assessing the balance of convenience requires considering whether greater harm will be suffered if injunctive relief is or is not granted.[135]

132. The factors that must be considered in weighing the balance of convenience are numerous and will vary in each case. The public interest is an important factor to be weighed in constitutional cases.[136]

133. Assessing the balance of convenience in a constitutional case is a complex exercise, largely due to the assumption that laws enacted by Parliament are directed to the common good.[137] In this situation, the party seeking injunctive relief must demonstrate that the suspension of legislation sought will itself provide a public benefit or that no harm to the public interest will occur.[138]

134. Here, when each of the relevant factors is properly weighed, it is clear that the injunctive relief sought by the Federation is in the public interest and the balance of convenience favours granting injunctive relief.

(1) The Injunction is Narrow in Scope

135. The interlocutory relief sought by the Federation is narrow in scope, and is simply a continuation of the existing Consent Order.[139]

136. The Federation does not seek a suspension of the New Legislation. It only seeks an exemption for legal professionals, who have been recognized by this Court as occupying a unique position when it comes to the administration of justice.[140] In *RJR*, the Supreme Court recognized that the "the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than

---

[135] *RJR*, para. 65

[136] *RJR*, para. 63

[137] *PCA Injunction Decision*, para. 85

[138] *Cambie Surgeries,* para. 171

[139] Order of Justice Murray made September 14, 2023

[140] *PCA Injunction Decision*, paras. 100, 106

when the application of the law is suspended entirely."[141] Injunctive relief is more likely to be granted where the legislation in question will continue to apply to the majority of the population.[142]

137. As was the case in the *PCA Injunction Decision*, granting injunctive relief in this instance will not significantly impair the intent of the New Legislation. It will continue to apply to taxpayers, accountants, and other advisors. Granting injunctive relief will, however, prevent significant harm to the public perception of the sanctity of the solicitor-client relationship.[143]

138. The proposed injunction will also be of limited duration. The Federation is prepared to move expediently towards a hearing of this challenge on the merits, subject to the availability of the Attorney General and this Court.

139. In its Application Response, the Attorney General claims that the injunctive relief sought is too broad in scope.[144] This is surprising to the Federation as the order sought on this application is virtually identical to the language in the Consent Order. The Federation only asks that the terms of the Consent Order be continued.

(2) <u>Granting the Exemption is in the Public Interest</u>

140. In *Charter* challenges the government is not the exclusive representative of a monolithic "public".[145] As the Supreme Court held in *RJR*, "the government does not have a monopoly on the public interest."[146]

141. The fact that the government's actions may be in pursuit of the public interest does not necessarily tip the balance against issuing an injunction and the public interest may not always weigh in favour of enforcing existing legislation.[147] Rather, it is open to either party to tip the scales of convenience in its favour by demonstrating a compelling public interest in either the granting or the refusal of an injunction. Assessing the public interest includes considering both the

---

[141] *RJR*, para. 73

[142] *Quebec School Board Association*, para. 61

[143] *PCA Injunction Decision*, paras. 101, 103

[144] Application Response, para. 33

[145] *RJR*, para. 66

[146] *RJR*, para. 65

[147] *Conseil Scholaire Fransaskois*, para. 86; *Quebec School Board Association*, para. 59

concerns of society generally and the particular interests of identifiable groups. The court may consider harm to individuals or groups that are not party to the litigation at hand.[148]

142. While the monitoring of transactions that generate tax benefits may be legitimate activity by the CRA, the Supreme Court of Canada has made it clear that preservation of the solicitor-client relationship is a fundamental constitutional value. As this Court concluded in the *PCA Injunction Decision* (which was rendered prior to the decision in that case by the Supreme Court and in *Chambre*), an injunctive order that will maintain the sanctity of this relationship is in the public interest.[149] Granting injunctive relief in this case is necessary to maintain public confidence in the solicitor-client relationship.

143. There is no harm done to the public interest if injunctive relief is granted. This is because:

(a) if one accepts the government's claim that it is only seeking the same information from legal professionals as it seeks from taxpayers, other advisors and promoters, then all of those parties will still be required to provide the information sought in the period pending the determination of the petition;

(b) the government has waited two years from the release of the 2021 Budget (and eight years from the release of the 2015 OECD/G20 Base Erosion and Profit Shifting Project Report (the "**BEPS Report**"), which, as discussed below, the Attorney General claims underlies the changes suggested in the 2021 Budget)[150] to implement the New Legislation—there is clearly no urgency here; and

(c) the duration of relief that the Federation seeks is relatively brief.

(3) <u>The Nature of the Constitutional Challenge Favours the Exemption</u>

144. The strength of the applicant's case is also a factor to be weighed in the balance of convenience analysis.[151]

145. This was an important factor in this Court's recent decision in the *Cambie Surgeries* litigation to grant an injunction staying the enforcement of certain financial penalties under the

[148] *RJR*, paras. 66-67; *Cambie* Surgeries, para. 168

[149] *PCA Injunction Decision*, para. 103; see also *True North*, para. 100

[150] Application Response, para. 9

[151] *Canadian Broadcasting Corp. v. CKPG Television Ltd*., 1992 CanLII 560 (B.C.C.A.), pg. 10

Medicare Protection Act pending a determination of their constitutional validity. [152] In that case, this Court found that the Supreme Court of Canada jurisprudence the plaintiffs relied on as support for the legislation at issue being unconstitutional had, while not settled law, "opened the door" for the *Charter* arguments the plaintiffs intended to make at trial.[153] That is, the Court found that the strength of the plaintiffs' *Charter* argument should be considered in the balance of convenience analysis.

146. The constitutional challenge in this case is even more compelling. Here, the relevant Supreme Court of Canada decisions (*FLSC*, *Chambre* and others) do not simply "open the door" for *Charter* scrutiny of the New Legislation. Rather, these recent decisions provide direct support for the unconstitutionality of the New Legislation. In each of those decisions, the Court concluded that requiring legal professionals to report on their clients violated the *Charter* on the same grounds the Federation invokes in the present case. The strength of the Federation's challenge to the New Legislation and the important interests it seeks to protect by obtaining injunctive relief weigh heavily in favour of granting injunctive relief.

(4) Granting the Exemption Will Preserve the Status Quo

147. The status quo is also an important consideration in the balance of convenience analysis.[154] As recently stated by this Court, "preservation of the status quo is the preferred outcome on consideration of the competing factors for balance of convenience".[155]

148. As in the *FLSC Injunction Decision*, the Federation only seeks maintenance of the status quo so that the Court can render a meaningful and effective judgment.

149. The status quo is assessed at the time the application for injunctive relief is brought.[156] Since 2013, lawyers have not been required to disclose information about reportable transactions to the CRA if another party did. Throughout that period, the government relied on taxpayers as

---

[152] *Cambie Surgeries,* paras. 180-181

[153] *Cambie Surgeries,* paras. 180-183

[154] *PCA Injunction Decision*, para. 102; *EnWave Corporation v. Dehydration Research LLC,* 2022 BCSC 637, para. 111, leave to appeal denied 2022 BCCA 347; *Phoenix Restorations Ltd. v. Drisdelle,* 2014 BCSC 1497, para. 31

[155] *Granberg v. Granberg*, 2021 BCSC 1215, para. 10

[156] *Dupont v The Corporation of the City of Port Coquitlam*, 2020 BCSC 1127, paras. 46-47; *Pacific Northwest Enterprises Inc. v. Ian Downs & Associates Ltd.* (1982), 42 B.C.L.R. 126 (C.A.), para. 27

the primary source of obtaining this information, because the Old Legislation did not require legal professionals to report on their clients when the taxpayer had already reported.

150. There is no urgency to allowing the state to now reach into legal professionals' files in order to strengthen its ability to investigate their clients' transactions. The prejudice suffered by the government from an exemption that maintains the status quo during the short period of time required for the determination of the petition, if any, is minimal.

(5) The Government will Not Suffer any Harm

151. The balance of convenience also considers any harm alleged by the respondent or to the public interest.[157]

152. The Attorney General has not provided any evidence of harm (and indeed has not filed any evidence at all on this application). It instead relies on the presumption that the New Legislation has been enacted in the public interest. The Attorney General has not even introduced evidence that the CRA or the Minister is charged with promoting or protecting the public interest or that the New Legislation was undertaken pursuant to that responsibility, both of which are a prerequisite to reliance on any assumption as to the public interest.[158]

153. Aside from speculative statements with no evidentiary foundation, the only attempt by the Attorney General to support the need for the New Legislation is reference to the 2015 BEPS Report.[159] This is not admissible evidence or sufficient proof of Parliamentary intent. It is also outdated, and the Attorney General's reliance on it as the motivation behind the New Legislation confirms there is no urgency to enforcing the New Legislation.

154. Irrespective of whether it is admissible or not, the Attorney General mischaracterizes the BEPS Report.

155. The Attorney General claims in its Application Response that "the BEPS Report recommends a dual disclosure obligation."[160] This is not correct. The BEPS Report identifies two

[157] *RJR*, para. 57

[158] *Cambie Surgeries*, para. 137

[159] Application Response, Part 4, para. 3

[160] Application Response, Part 4, para. 13

potential options for disclosure obligations and outlines the benefits and drawbacks of both. It identifies the following options:[161]

(a) Option A: Both the promoter and the taxpayer have the obligation to disclose separately (i.e., dual disclosure).

(b) Option B: Either the promoter or the taxpayer has the obligation to disclose.

156. While the BEPS Report acknowledges that a dual disclosure regime reduces the risk of inadequate disclosure, it also notes its drawbacks, such as greater administrative and compliance costs for taxpayers and potentially tax administrators. The BEPS Report concludes that "whether these increased costs merit the benefits of dual disclosure obligations must be considered in deciding who has to report."[162] It also recognizes the benefits and effectiveness of the different (and less intrusive) approach taken in other countries, such as the UK.[163]

157. The BEPS Report also states that mandatory disclosure rules should be clear and easy to understand so that taxpayers have certainty as to what is required. It notes that "[l]ack of clarity and certainty can lead to inadvertent failure to disclose (and the imposition of penalties), which may increase resistance to such rules from taxpayers. Additionally, a lack of clarity could result in a tax administration receiving poor quality or irrelevant information."[164] It is indisputable that the New Legislation is not clear or easy to understand.

E. AN UNDERTAKING AS TO DAMAGES IS NOT APPROPRIATE

158. An undertaking as to damages by the party seeking injunctive relief is normally required. However, relief from this requirement will be granted in special circumstances, including where the Court is of the view that the relief sought is meritorious and in the public interest.[165]

---

[161] BEPS Report, pg. 33

[162] BEPS Report, pg. 36

[163] BEPS Report, pgs. 25-27, 36

[164] BEPS Report, pg. 19

[165] *Taseko Mines Limited v. Phillips*, 2011 BCSC 1675, *Randall v. Caldwell First Nations of Point Pelee,* 2000 CanLII 15235 (FC); *Taseko,* para. 105, see also *Ghag Estate v. Ghag*, 2021 BCSC 815, paras. 32-35; *William v. British Columbia,* 2018 BCSC 1271, para. 19; *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nations*, 2006 CarswellOnt 4758 (ONSC), paras. 122 and 124

159. The Federation should be exempt from the usual requirement to provide the respondent with an undertaking as to damages. The Federation brings this constitutional challenge in the public interest. As a not-for-profit corporation, it is also not feasible for the Federation to provide an undertaking as to damages.[166]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this sixth day of October, 2023.

Roy W. Millen / Claire Hildebrand

[166] Perry Affidavit, paras. 42-43