No. S-236280
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 ATTORNEY GENERAL OF CANADA

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I. OVERVIEW

1. The Federation of Law Societies of Canada (**Federation**) bears the onus of satisfying the test for an injunction on this application. It has failed to do so. Although the constitutional challenge raises a serious question, the applicant has failed to demonstrate that the relatively modest modifications to the mandatory reporting rules in the *Income Tax Act*[1] (*ITA*) would cause irreparable harm to legal professionals, their clients and the public. Legal professionals and other tax practitioners have been complying with mandatory reporting rules since 2013, as have their clients. As the information is already reportable by the client, requiring legal professionals to report does not create a new intrusion on privacy or the solicitor-client relationship. Legal professionals have also had sufficient notice to adapt their legal practice and they can avail themselves of protections in the *ITA* to mitigate the concerns they raise. The public interest in the proper administration and enforcement of the *ITA* and ensuring that taxpayers do not undermine the integrity of Canada's tax system by engaging in abusive tax avoidance, outweighs the speculative harm alleged by the applicant.

2. The mandatory reporting rules target a narrow subset of aggressive or abusive tax avoidance transactions. They do not target normal commercial transactions but highly artificial and carefully planned transactions that are designed to obtain tax benefits in ways that may be abusive of the legislation. The hallmarks that trigger a reporting transaction are common features of such non-commercial transactions. The reporting requirements triggered by these rules would not result in a broad sweep of legal professionals' transaction files.

3. To assist the Minister of National Revenue (**Minister**) with the administration of the *ITA*, Parliament introduced the mandatory reporting rules in 2013 for taxpayers who participate in certain tax avoidance transactions, as well as for advisors and promoters who facilitate these transactions. The 2023 amendments to these rules

[1] *Income Tax Act*, RSC 1985, c 1 (5th Supp), as amended [*ITA*]

improve the gathering of relevant information to assist the Canada Revenue Agency (**CRA**) to respond to tax risks, including any aggressive or abusive tax planning strategies, and to deter parties from entering into such transactions.

4. Enhanced reporting will enable the Minister to protect the integrity of the tax system. It will also enable the CRA to administer the tax system more effectively and more fairly in the public interest.

5. The mandatory reporting rules are regulatory provisions aimed at addressing aggressive or abusive tax avoidance. They are not aimed at finding and prosecuting criminals and those who abet them. The rules are completely different from the provisions at issue under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, which were criminal law in nature. Different standards and frameworks apply.

6. This application is not the hearing of the Federation's petition on the merits. Canada was not required to file affidavit evidence on this application. The strength of Canada's position on the merits should not be prejudged on this interlocutory application as Canada has not yet filed its petition response or supporting affidavits.

II. SUMMARY OF FACTS

A. The Legislation

7. In 2013, Parliament introduced rules in the *ITA*, requiring certain persons to disclose transactions undertaken to avoid tax (**Mandatory Disclosure Rules**).[2]

8. Pursuant to these rules, an information return in prescribed form and describing certain "reportable transactions" was required to be filed with the Minister by:

[2] *Technical Tax Amendments Act, 2012,* SC 2013, c 34, s 356, applicable in respect of avoidance transactions entered into after 2010.

a. a person who obtained a tax benefit as a result of the transaction (a "taxpayer");

b. a promoter of the transaction, generally defined as a person who "promotes or sells an arrangement, plan or scheme", and;

c. an advisor, generally defined as a person who provides assistance or advice with respect to creating, developing, planning, organizing or implementing the transaction.[3]

9. Reportable transactions were "avoidance transactions", within the meaning of subsection 245(3) of the *ITA*, meaning transactions undertaken or arranged primarily to obtain a tax benefit. In addition to their characterisation as avoidance transactions, reportable transactions were required to have two of three generic hallmarks, namely contingent fee arrangements, confidential protection or contractual protection.[4]

10. In addition to the possible disallowance of the tax benefits resulting from the transaction, the consequences for failing to comply with the mandatory disclosure rules included a penalty equal to the fees payable to an advisor or a promoter.[5]

11. On April 20, 2023, *Bill C-47: An Act to implement certain provisions of the budget tabled in Parliament on March 28, 2023* (**Bill C-47**) was introduced in the House of Commons.[6]

12. Part I of Bill C-47 implemented various income tax measures through amendments to the *ITA* and other related statutes and regulations. This includes amendments to

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[3] *Income Tax Act,* RSC 1985, c 1, (5th Supp.) as repealed by *An Act to implement certain provisions of the budget tabled in Parliament on March 28, 2023,* SC 2023, c 26 [***ITA* repealed**] ss 237.3 (1), "promoter" and "advisor" and 237.3(2).
[4] *ITA* repealed, s 237.3 (1), "reportable transaction".
[5] *ITA* repealed, s 237.3 (6) and (8).
[6] Bill C-47*, An Act to implement certain provisions of the budget tabled in Parliament on March 28, 2023*, 1st Sess, 44th Parl, 2023 (assented to 22 June 2023) SC 2023, c 26 [**Bill C-47**].

the Mandatory Disclosure Rules in section 237.3 and the introduction of section 237.4, which extend the Mandatory Disclosure Rules to notifiable transactions (**Amendments**).[7]

13. Notifiable transactions are transactions that are designated as such by the Minister with the concurrence of the Minister of Finance.[8] While a list of any such transactions has yet to be published by the Minister, they will include transactions which the Minister has found to be abusive and other transactions of interest, where more information is required to determine whether they are abusive.[9]

14. The amendments to section 237.3 introduced by Bill C-47 are relatively modest and do not fundamentally change the disclosure obligations of taxpayers, promoters or advisors under the Mandatory Disclosure Rules.

15. On June 22, 2023, Bill C-47 received royal assent.[10]

B. Canada's Rationale With Respect to the Amendments

16. Parliament has imposed upon the Minister the duty to administer and enforce the *ITA.*[11]

17. Canada's tax system is based on self-reporting and self-assessment. The Minister does not participate in taxpayers' affairs and cannot audit every taxpayer to ensure compliance. The success of Canada's system depends on taxpayers' honesty and integrity in preparing their returns.[12]

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[7] Bill C-47.
[8] *ITA*, s 237.4(3).
[9] Government of Canada, Canada Revenue Agency, *CRA compliance and enforcement, Mandatory disclosure rules – Guidance* (2023) [**CRA Guide**], online: <https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/mandatory-disclosure-rules-overview/guidance-document.html>
[10] Bill C-47.
[11] *ITA*, s 220(1).
[12] ***McKinlay,*** at 636-637; ***Jarvis,*** at paras 49-52.

18. Canada announced its intention to enhance the Mandatory Disclosure Rules in the 2021 federal budget.[13]

19. Parliament enacted the Amendments to improve the gathering of relevant information to assist the CRA to respond to tax risks.[14] The lack of timely, comprehensive and relevant information on aggressive tax planning strategies is one of the main challenges faced by tax authorities worldwide, including the CRA.[15] It is important for Canada to obtain timely information on arrangements that involve aggressive tax planning to enable the CRA to act against any aggressive or abusive tax planning strategies. This information will enable CRA to perform informed risk assessments and audits, and Canada to consider responsive legislative amendments.[16]

20. The Amendments provide an effective tool for increasing reporting of aggressive or abusive tax planning by providing the CRA with better information, and to deter parties from entering into such transactions.[17]

21. The Amendments implemented recommendations from the Base Erosion and Profit Shifting Project (**BEPS Project**), Action 12 Report (**BEPS Report**). The BEPS Project is an initiative of the G20 and the Organisation for Economic Co-operation and Development. The BEPS Project was primarily devoted to tackling the problem of certain corporations and wealthy individuals inappropriately shifting profits offshore and using other tax avoidance schemes.[18] This project has shown that stronger rules are required to strengthen the CRA's ability to curtail aggressive tax

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[13] Government of Canada, Department of Finance, *Budget 2021: A Recovery Plan for Jobs, Growth and Resilience, Tax Measures: Supplementary Information* (2021), Annex 6 Tax Measures: Supplementary Information, Mandatory Disclosure Rules [**Budget 2021**] at 629-639.
[14] Budget 2021, at 629.
[15] Budget 2021, at 629.
[16] Budget 2021, at 629.
[17] Canada, Parliament, Senate, Standing Committee on National Finance (NFFN) on the subject matter of Bill C-47, An Act to implement certain provisions of the budget tabled in Parliament on March 28, 2023, *Finance Canada Response to Committee Undertaking*, 44th Parl, 1st Sess (10 May 2023) [**Standing Committee**] at 5.
[18] OECD, *Mandatory Disclosure Rules, Action 12 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (Paris: OECD Publishing, 2015) [**BEPS Report**] at 13.

avoidance in both the domestic and international context.[19]

22. Many of the measures recommended by the BEPS Report have been implemented in countries with comparable tax systems.[20] To improve the effectiveness of Canada's mandatory disclosure rules and to bring them in line with international best practices, amendments to the reportable transaction rules were proposed.[21]

23. The Mandatory Disclosure Rules introduced in 2013 were intended to provide the CRA with the information it needs to fight abusive tax avoidance. However, CRA's experience with these rules since their introduction in 2013 indicates that they were not sufficiently robust to address Canada's concerns as they resulted in only limited reporting by taxpayers.[22]

24. For example, the BEPS Report recognized that Canada's previous timeline for parties to file information returns under section 237.3 by June 30 of the following calendar year after which the reportable transaction became reportable, could result in significant time lag between the implementation of the scheme and the disclosure. The BEPS Report also observed that this timeline rendered Canada less able than other countries to react quickly to tax avoidance planning, potentially leading to greater revenue loss and a reduced deterrent effect.[23]

25. With respect to notifiable transactions, the BEPS Report recommended the timely disclosure of specific tax schemes in order to notify tax administrators of certain transactions to allow governments to quickly develop targeted and appropriate responses to these transactions.[24]

26. Prior to the Amendments, the *ITA* also had an existing rule that relieved parties from the disclosure obligation when another party to the transaction had already fulfilled

[19] Budget 2021, at 310.
[20] Budget 2021, at 630.
[21] Budget 2021, at 632.
[22] Budget 2021, at 631-632; CRA Guide.
[23] BEPS Report, at 51.
[24] BEPS Report, at 49-52.

the disclosure obligation.[25] However, the BEPS Report indicated that imposing the disclosure obligations on all parties could lead to a stronger deterrent effect on both the supply (advisor or promoter) and demand (taxpayer/user) with respect to an avoidance scheme.[26] Accordingly, Canada proposed to adopt a dual disclosure approach, as it can reduce the risk of inadequate disclosure because, for example, a taxpayer's disclosure can be checked against the advisor's or promoter's disclosure to determine whether the information provided is accurate and comprehensive.[27]

27. Further, prior to the Amendments, in order for a transaction to be reportable under the Mandatory Disclosure Rules, it had to be an "avoidance transaction", and the transaction had to have at least two of the three generic hallmarks, which will be discussed further below.[28]

28. The BEPS Report recommended that mandatory disclosure regimes include a mixture of generic and specific hallmarks, with the existence of each of them resulting in a requirement for disclosure. Generic hallmarks target features that are common to promoted schemes, such as the requirement for confidentiality or the payment of a contingent fee. Specific hallmarks target particular areas of concern, such as trading in losses.[29]

29. With respect to reportable transactions, it was proposed that only one generic hallmark needs to be present in order for a transaction to be reportable.[30] Comparable jurisdictions do not require the presence of more than one hallmark to trigger the disclosure obligations of reportable transactions.[31] Notifiable transaction reporting will also improve the gathering of relevant and timely information to assist the CRA to respond to tax risks posed by abusive tax transactions (or by transactions

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[25] *ITA* repealed, s 237.3(4).
[26] BEPS Report, at 35.
[27] Budget 2021, at 632.
[28] Budget 2021, at 630.
[29] Budget 2021, at 631.
[30] Budget 2021, at 632.
[31] Standing Committee, at 5.

which have potential for abuse, but with respect to which the CRA does not have enough information to make that assessment).[32]

30. With respect to notifiable transactions, comparable jurisdictions with equivalent requirements to disclose notifiable transactions noted that the notifiable transaction regimes have been effective.[33] It is expected that the notifiable transaction regime will deter some taxpayers from entering into aggressive or abusive tax planning schemes that have been designated as a notifiable transaction.[34]

C. The Amendments

I. Reportable Transactions

31. As set out above, the *ITA* contained pre-existing reporting requirements respecting reportable transactions. The Amendments modify section 237.3 as follows:[35]

    a. modify the triggering requirement of reportable transactions from two hallmarks to one hallmark;

    b. modify the filing deadline from June 30 of each year to 90 days after the person becomes contractually obligated to enter into the reportable transaction or the transaction has been entered into;

    c. repeal subsection 237.3(4) that relieved parties from the disclosure obligation when another party to the transaction has already fulfilled the disclosure obligation. The Amendments require all parties, including advisors and promoters to file an information return with the CRA in the prescribed form and containing prescribed information in respect of a reportable transaction pursuant to subsections 237.3(2); and

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[32] Budget 2021, at 633.
[33] Standing Committee, at 5.
[34] Standing Committee, at 5.
[35] *ITA,* s 237.3; Bill C-47.

d. modified the penalties such that non-compliance of the reporting requirement would also result in a $10,000 penalty and $1,000 for each day during the failure to report continues, up to a maximum of $100,000.

32. The Amendments also provide an extension of the applicable reassessment period where an information return that is required to be filed is not filed as and when required by section 237.3.[36]

33. Normal commercial transactions that do not pose an increased risk of abuse, in and of themselves, are not intended to result in a reporting obligation under the reportable transactions rules.[37] Reportable transactions are transactions undertaken to avoid tax that meet the following criteria:[38]

    a. A transaction or series of transactions has one of the three hallmarks:

        (i) contingent fee arrangements;

        (ii) confidential protection; or

        (iii) contractual protection; and

    b. It can reasonably be concluded that one of the main purposes of entering into the transaction or series of transactions is to obtain a tax benefit.[39]

34. There is no legislative reporting obligation under section 237.3 where none of these three generic hallmarks are present, even when it can reasonably be concluded that one of the main purposes of entering into the transaction or series of transactions is to obtain a tax benefit.[40]

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[36] *ITA*, s 152(4)(b.5)
[37] Canada, Department of Finance, *Explanatory Notes Relating to the Income Tax Act and Other Legislation* (The Honourable Chrystia Freeland, P.C., M.P, Deputy Prime Minister and Minister of Finance, April 2023) [**Explanatory Notes**] at 71.
[38] *ITA*, s 237.3(1).
[39] CRA Guide, "Reportable Transactions".
[40] CRA Guide, "Reportable Transactions".

35. Further, as the mandatory disclosure rules avoid targeting normal commercial transactions, not all transactions that relate to the three hallmarks above trigger the reporting obligation with respect to reportable transactions, only those that tend to be present in aggressive tax planning schemes. Such transactions are further discussed below.

(i) contingent fee arrangements

36. Transactions involving contingent fee arrangements that would meet the legislative hallmark triggering the mandatory disclosure obligation with respect to reportable transactions include the following:[41]

    a. contingent fees that are attributable to the amount of the tax benefit from the transaction or series of transactions;

    b. contingent upon the obtaining of a tax benefit from the transaction or series of transactions; or

    c. contingent fees that are attributable to the number of taxpayers who participate in the transaction or who have been provided access to advice given by the promoter or advisor regarding the tax consequences of the transaction.

(ii) confidential protection

37. Transactions where a promoter or tax advisor requires confidential protection with respect to the details or structure of the transaction or series of transactions under which a tax benefit results or would result would meet the legislative hallmark triggering the mandatory disclosure obligation with respect to reportable

[41] *ITA*, s 237.3(1), "reportable transactions".

transactions. However, a reporting obligation would not arise with respect to protection of trade secrets that do not relate to tax.[42]

(iii) contractual protection

38. Transactions involving contractual protection that would meet the legislative hallmark triggering the mandatory disclosure obligation with respect to reportable transactions include the following:[43]

    a. any form of insurance (other than standard professional liability insurance) or other protection (including an indemnity, compensation, or a guarantee) that, either immediately or in the future and either absolutely or contingently:

        (i) protects a person against a failure of the transaction or series of transactions to achieve any tax benefit from the transaction or series of transactions; or

        (ii) pays for or reimburses any expense, fee, tax, interest, penalty or similar amount that may be incurred by a person in the course of a dispute in respect of a tax benefit from the transaction; and

    b. any form of undertaking provided by a promoter, or by any person who does not deal at arm's length with a promoter, that provides, either immediately or in the future and either absolutely or contingently, assistance, directly or indirectly in any manner whatever, to a person in the course of a dispute in respect of a tax benefit from the transaction or series of transactions.

39. The contractual protections that trigger the disclosure of reportable transactions are not intended to include those present in normal commercial transactions.[44] For example, a reporting obligation would not arise with respect to normal professional

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[42] CRA Guide, "Reportable Transactions".
[43] *ITA*, s 237.3(1), "contractual protection".
[44] CRA Guide, "Reportable Transactions".

liability insurance of a tax practitioner, which would not in and of itself satisfy the contractual protection reporting hallmark.[45]

(iv) notifiable transactions

40. The Amendments also introduce a new requirement to report notifiable transactions under section 237.4.[46] Notifiable transactions are transactions specifically designated by the Minister, with the concurrence of the Minister of Finance, that involve structures aimed at tax avoidance by reference to specific hallmarks.[47] As of the date of these submissions, the Minister has not designated any transactions as notifiable transactions.

41. Notifiable transactions include transactions that the CRA has found to be abusive, and transactions identified as transactions of interest which may be abusive.[48] However, they all involve structures aimed at tax avoidance.

42. Where a transaction, or a series of transactions, is the same as or substantially similar to a transaction, or a series of transactions, designated by the Minister, the transaction, or any transaction in the series, triggers the mandatory disclosure requirement under notifiable transactions.[49] The term substantially similar includes any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar tax strategy.[50]

43. As demonstrated above, the amendments to the mandatory reporting rules in the *ITA* set out in sections 237.3 and 237.4 do not target normal commercial

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[45] CRA Guide, "Reportable Transactions".
[46] *ITA*, s 237.4.
[47] CRA Guide, "Notifiable Transactions"; *ITA* repealed, s 273.3(1), "reportable transaction"; *ITA*, s 237.4(1) "notifiable transaction."
[48] CRA Guide, "Notifiable Transactions".
[49] Government of Canada, Department of Finance Canada, *Income Tax Mandatory Disclosure Rules Consultation: Sample Notifiable Transactions* (2022) [**Sample Notifiable Transactions**].
[50] CRA Guide, "Notifiable Transactions"; Explanatory Notes, at 82.

transactions. They target, in general, transactions that are likely to be abusive or that may be abusive, because they are avoidance transactions that exhibit a hallmark of tax-motivated, non-commercial features (reportable transactions), and transactions that are already known or suspected to be abusive forms (notifiable transactions). These amendments assist the Minister in collecting information to identify and respond to tax risks posed by tax planning schemes.[51]

(v) exemptions from disclosure requirement

44. Pursuant to the Amendments, all persons required to report a reportable transaction under subsection 237.3(2), including legal professionals, are protected by subsection 237.3(17) which exempts disclosure of information by any persons that it is reasonable to believe is subject to solicitor-client privilege.

45. Similar to reportable transactions, all persons required to report a notifiable transaction under subsection 237.4(4), including legal professionals, are protected by subsection 237.4(18) which also exempt by any persons the disclosure of information that is subject to solicitor-client privilege.[52]

46. The requirement to report a notifiable transaction under subsection 237.4(4) does not apply in certain circumstances. Under subsection 237.4(6), a person who obtains or expects to obtain a tax benefit from a notifiable transaction and a person who enters into such transactions for the benefit of such a person will not have a reporting obligation if that person has exercised the degree of care, diligence and skill to determine whether a transaction is a notifiable transaction that a reasonably prudent person would have exercised in comparable circumstances.[53] Under subsection 237.4(7), only advisors and promoters who know or are reasonably expected to

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[51] BEPS Report, at 13.
[52] *ITA*, s 237.4(18).
[53] CRA Guide, "Notifiable Transactions".

know that a transaction was a notifiable transaction are required to file an information return in respect of it.[54]

47. Additionally, under subsection 237.3(11), where a person who is required to file an information return in respect of a reportable transaction fails to do so, the person is not liable for any penalty under the section if the person has exercised the degree of care, diligence, and skill to prevent the failure to file that a reasonably prudent person would have exercised in comparable circumstances.

II. Content of Reporting Requirement

48. The prescribed form to file with the CRA is Form RC312, the Reportable and Notifiable Transaction Information Return (2023 and later years). Under the prescribed form, all persons required to report would need to disclose:

a. the identification of the person required to disclose;

b. the identification of the person obtaining the tax benefit;

c. information regarding a notifiable transaction including whether it is a transaction designated by the Minister or substantially similar to such a transaction, and the reason for disclosing;

d. information about the reportable transaction, including a description and details of the transaction and identification of any advisor or promoter;

e. information if the information return is filed late; and

f. certification of the information return.[55]

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[54] *ITA*, ss 237.4(6) and 237.4(7).
[55] Canada Revenue Agency, Form RC312, "Reportable Transaction and Notifiable Transaction Information Return (2023 and later years)", online: <www.canada.ca/content/dam/cra-arc/formspubs/pbg/rc312/rc312-23e.pdf>.

49. Prior to the Amendments, the prescribed form to file with the CRA was Form RC312, the Reportable Transaction Information Return (2011 and later tax years). The form required substantively the same information to be reported, such as the identification of the taxpayer, information about the reportable transaction, including a description and details of the transaction, information of the person filling out the return, including whether it is the taxpayer, an authorized representative, a person who entered into the transaction for the benefit of the taxpayer or an advisor or promoter, and the certification of the information return.[56] The form has not materially changed.

50. The content of the reporting requirement in the prescribed form is identical for every person required to report whether it is the person for whom a tax benefit results or is expected to result from the reportable or notifiable transaction, or the advisor or promoter.[57]

51. The first deadline to file an information return and report a reportable or notifiable transaction under the Amendments began on September 21, 2023.

D. The Current Proceeding

52. On September 5, 2023, counsel for the Federation sent a letter to the respondent advising of its intention to challenge the constitutionality of the Amendments and seek an interlocutory declaration that legal professionals are exempt from the operation of the amendments to sections 237.3 and 237.4 of the *ITA* introduced by Bill C-47.

53. On September 11, 2023, the Federation filed and served the petition challenging the constitutionality of the Amendments. On the same date, the Federation served an unfiled application for interim and interlocutory injunctive relief on Canada.

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[56] Canada Revenue Agency, Form RC312, "Reportable Transaction Information Return (2011 and later tax years)", [**Form RC312 (2011 and later tax years)]** online: <www.canada.ca/content/dam/cra-arc/formspubs/pbg/rc312/rc312-17e.pdf>.
[57] Form RC312 (2011 and later tax years).

54. On September 14, 2023, the Court issued an order, *inter alia*, that, "[w]ith the consent of the Federation and Canada, legal professionals are exempt from the application of the Amendments until the earlier of the release of the Court's decision on the injunction application or November 20, 2023; …."

55. Canada consented to the temporary injunction expressly on the basis that doing so did not constitute an admission of the merits of the substantive injunction application, nor agreement to or acknowledgment of the need for a further injunction, and was not a waiver or restriction of any positions that Canada may take. The Court should not rely on the existence or terms of the temporary interim injunction in determining whether to grant an injunction, or the terms thereof.

III. ISSUES

56. This application raises the issue of whether the applicant meets the test for an interlocutory injunction such that the Court should grant the relief sought by the applicant and exempt legal professionals from the application of the Amendments.

IV. POINTS OF ARGUMENT

A. The Test for an Interlocutory Injunction

57. Interlocutory injunctions are an extraordinary remedy that should not be lightly granted. Courts must be careful of making rulings, which deprive legislation enacted by Parliament of its effect, while balancing their role to safeguard fundamental *Charter* rights.[58]

58. The test to be applied for interlocutory injunctive relief is set out by the Supreme Court of Canada in *RJR-MacDonald v. Canada (Attorney General).*[59] The party

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[58] *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 [***RJR-MacDonald***] at 333-334. Also see *Manitoba (Attorney General) v Metropolitan Stores Ltd*., [1987] 1 SCR 110, 1987 CanLii 79 (SCC) [***Metropolitan***].

[59] *RJR-MacDonald,* at 332-333.

seeking an interlocutory injunction must prove:

1. there is a serious issue to be tried;

2. irreparable harm will result if the injunction is not granted; and

3. the balance of convenience, considering all of the circumstances, favours granting the injunction.[60]

59. The fundamental question the Court must determine is whether the granting of the injunction is just and equitable in all the circumstances of the case.[61]

60. Canada concedes that the Federation has raised a serious issue in its petition; however, Canada submits that the applicant has failed to establish that irreparable harm will occur as the alleged harm is speculative, and the balance of convenience favours Canada because of the important public purpose of the legislation. Accordingly, this application must fail.

B. There is a Serious Issue To Be Tried

61. In its application response, Canada conceded that the applicant's petition raises a serious issue to be tried.

62. Despite Canada's concession on this point, the Federation has unnecessarily included an extensive argument on the strength of its substantive case. It would be inappropriate for the Court to weigh in on the merits of the petition at this stage where Canada has not filed its petition response and its evidence to support the legislation is not before the Court.

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[60] *RJR-MacDonald,* at 334; *Metropolitan,* at para 36; *Harper v Canada* (Attorney General), 2000 SCC 57, at para 5.

[61] *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34 at para 25; *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2017 BCCA 395 [***Vancouver Aquarium***] at paras 37-38.

63. The Supreme Court of Canada has held that once the first stage of the test is satisfied, a prolonged examination of the merits is neither necessary nor desirable.[62] This is because on an interlocutory application, the Court has neither a full record of the evidence to be heard and tested during the hearing on the merits nor sufficient time to properly weigh that evidence.

64. The two exceptions to this general rule are where the result of the application will effectively amount to the final determination of the action or when the question of constitutionality presents itself as a simple question of law alone.[63] Neither exception applies in this case and the Court should proceed to considering the irreparable harm and balance of convenience stages, and not delve into the merits of the petition.

C. Irreparable Harm Has Not Been Made Out

65. At the second stage of the test, the Court must decide whether the applicant would suffer irreparable harm if the injunction is not granted.

66. The issue to be determined at this stage is whether a refusal to grant injunctive relief could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.[64] At this stage, only the alleged harm suffered by the applicant is considered. Any harm to the respondent or to the public interest is considered at the third stage.[65]

67. Irreparable harm refers to the nature of the harm suffered rather than its magnitude. Typically, it is harm that cannot be quantified in monetary terms or which cannot be cured. Irreparable harm is made out where there is monetary harm that cannot be

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[62] *RJR-MacDonald,* at 337-338.
[63] *RJR-MacDonald,* at 338-339.
[64] *RJR-MacDonald,* at 340-341.
[65] *RJR-MacDonald,* at 340.

compensated by damages.[66]

68. In order to establish irreparable harm, the applicant must prove that the alleged irreparable harm is real and substantial.[67] There must be a sound evidentiary foundation, beyond mere speculation that irreparable harm will result.[68] The requirement for proof of non-speculative harm applies even where an applicant alleges that the impugned conduct is based on allegations of unconstitutionality.[69]

69. The applicant fails to prove that irreparable harm would occur if the injunction is not granted. The alleged harm by the Federation is speculative and the evidence before the Court does not meet the required standard of proof to demonstrate irreparable harm to legal professionals nor to the public. The *ITA* provides reasonable protections for legal professionals and steps can be taken by them to mitigate any risk associated with the Amendments.

I. The Applicant Has Not Established Irreparable Harm From the Amendments

70. The applicant fails to establish how an interim declaration that legal professionals are exempt from the operation of the Amendments is necessary to prevent irreparable harm to legal professionals. The applicant asserts that "New legislation will require legal professionals to report confidential information to the government and act in a conflict of interest with their clients".[70] However, the Amendments introduced by Bill C-47 do not create the disclosure obligations on which the applicant relies. Legal professionals and other tax professionals have been complying with the Mandatory Disclosure Rules since 2013.

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[66] *RJR-MacDonald,* at 341.
[67] *P.D. v British Columbia,* 2010 BCSC 290 at paras 129-130.
[68] *Vancouver Aquarium,* at para 60.
[69] *International Longshore Warehouse Union, Canada v Canada (Attorney General),* 2008 FCA 3 at para 26; *Groupe Archambault Inc. v CMRRA/SODRAC Inc*., 2005 FCA 330 at paras 15-16.
[70] Federation's written arguments dated October 6, 2023, para 8.

71. At best, the Amendments can be said to have expanded the scope of the disclosure obligations by adopting the dual disclosure approach, creating a new category of notifiable transactions and lowering the threshold for reportable transactions. However, the modifications to section 237.3 introduced by Bill C-47 do not fundamentally change the disclosure obligations of taxpayers, promoters or advisors under the Mandatory Disclosure Rules. The applicant fails to establish how the operation of the Amendments, in and of themselves, will irrevocably harm the solicitor-client relationship or damage public confidence in the legal profession's duty of loyalty to its clients. The application fails on that ground alone.

II. This Case is Distinguishable From the Prior FLSC Litigation

72. The Federation relies on the case of the *Law Society of British Columbia v Attorney General of Canada*[71] (***PCA* Injunction Case**), where this Court found the applicants had proven irreparable harm. The case involved the *Proceeds of Crime (Money Laundering) Act* (***PCA***). However, unlike that case, legal professionals and the public will not suffer irreparable harm if interlocutory injunctive relief is denied in this case because the legislations at issue serve different purposes. The *PCA* was criminal in character, while sections 237.3 and 237.4 are part of a broader regulatory scheme. The impugned legislation in this case creates different obligations and provides different protections than the obligations and protections set out in the *PCA*. As set out below, there are numerous distinguishing factors between these cases.

73. An important factor is that the application in the *PCA* Injunction Case was heard within the week following the coming into force of brand new disclosure obligations. The current application targets changes to existing Mandatory Disclosure Rules that have been in force since 2013.

74. The *PCA* eventually became the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and the objective of the Act was to detect and deter the

[71] *Law Society of British Columbia v Attorney General of Canada,* 2001 BCSC 1593 [***PCA Injunction Case***].

serious crimes of money laundering and financing terrorist activity, and to facilitate their investigation and prosecution.[72] The legislation had a predominantly criminal law character, and its regulatory aspects served criminal law purposes.[73] In contrast, the Mandatory Disclosure Rules including the Amendments are not a criminal regime, but rather, are part of regulatory legislation intended to ensure the Minister has timely information needed to administer the tax system effectively and fairly. Sections 237.3 and 237.4 assist the Minister in gathering information about aggressive tax avoidance or abusive transactions. They are not intended to be a criminal enforcement tool, and the fact that information gathered by the Minister for regulatory administration purposes could also theoretically be used for criminal enforcement purposes has been held by the Supreme Court of Canada not to make it improper to gather the information for regulatory purposes.[74]

75. The criminal law nature of the *PCA* results in a high expectation of privacy, while the regulatory nature of the *ITA* results in a different expectation of privacy in respect of tax information. In the context of a self-assessment and self-reporting tax regime, a taxpayer has very little privacy interest in materials they are obliged to keep under the Act or produce to the CRA, including records relevant to filing of a tax return.[75]

76. The *PCA* required specified businesses and persons, including lawyers and law firms, to collect, record and retain material regarding persons on whose behalf they pay or receive money, and to report every financial transaction that they reasonably believe to be related to the commission of a money laundering offence by way of a Suspicious Transaction Report to the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) within 30 days after the person or entity first detected a fact that constituted reasonable grounds to suspect that the transaction was related to the commission of a money laundering offence.[76] The *PCA* casted a wide

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[72] Canada (Attorney General) v Federation of Law Societies of Canada, 2015 SCC 7, [2015] 1 SCR 401 [***PCTFA SCC Case***] at para 11.
[73] *PCTFA SCC Case,* at para 37.
[74] Jarvis, at para 97.
[75] Jarvis, at para 48, 72; McKinlay, at 641, 649-650.
[76] *PCA Injunction Case,* at paras 10-15.

net and had broad implications for legal professionals who often act as financial intermediaries for their clients and would be required to report every suspicious financial transaction. This is not the case here; only legal professionals who are involved in specific types of tax avoidance transactions are required to report.

77. The *PCA* also prohibited legal professionals from disclosing to their clients that they had made a Suspicious Transaction Report to FINTRAC or disclosing the contents of the report with the intent of prejudicing a criminal investigation, whether one had begun or not. [77] Unlike the *PCA*, there is no such prohibition under the *ITA*. Under both sections 237.3 and 237.4, the taxpayer client has the same reporting obligations as the legal professional. Specifically, subsections 237.3(2) and 237.4(4) require reporting of reportable transactions and notifiable transactions from multiple sources, including the taxpayer or another advisor or promoter.

78. The *ITA* does not impose obligations on lawyers that would undermine their duty of commitment to their client's cause. The *ITA*'s reporting obligations do not, as the applicant contends, turn lawyers into "agents of state". Under the Amendments, the client is well aware of what information is being reported to the Minister as they have the same reporting requirements. There are no restrictions in the legislation on what the legal professional can communicate to the client, including whether the transaction must be reported and what the reporting requirements are. The reporting requirements are different, and irreparable harm will not occur to legal professionals nor their clients in these circumstances.

III. Legal Professionals are Protected Under the Amendments

79. The Amendments also provide protection for legal professionals and their clients. Under subsections 237.3(17) and 237.4(18), information that is reasonably considered to be subject to solicitor-client privilege is exempt from disclosure. The impugned legislation does not require a person to disclose information to the CRA if

[77] *PCA Injunction Case,* at paras 16-17.

it is reasonable to believe that the information is subject to solicitor-client privilege. This disclosure exemption applies to all persons required to report. Accordingly, this affords legal professionals and their clients protection.

80. The applicant argues that despite the solicitor-client privilege exception, legal professionals may inadvertently disclose privileged information as a result of differing interpretations of the legislation or through use by a legal professional in their own defence. Aside from privileged information, the applicant also argues that confidential information will be required to be disclosed, which violates the sanctity of the lawyer-client relationship and requires legal professionals to breach their ethical obligations under the British Columbia *Code of Professional Conduct*.

81. As discussed above, the client and the legal professional are under the same obligation to report under sections 237.3 and 237.4. They are both required to file an information return using a prescribed form to provide information about the reportable transaction or the notifiable transaction. Other persons involved with the transaction are also required to report on the transaction. Given that the same information must be provided by the legal professional's client and other persons involved with the transaction, there can be no suggestion that the information reported on the prescribed form was intended to be kept confidential as between solicitor and client. As such, neither the lawyer's duty of confidentiality, nor solicitor-client privilege is engaged by the Amendments.[78]

82. Additionally, although legal professionals have an ethical duty to keep client information confidential, that duty is not absolute. It is subject to statutory provisions that compel production.[79] As set out in the Code of Conduct for each provincial or

[78] *Solosky v The Queen*, [1980] 1 SCR 821, at 835.
[79] Federation of Law Societies of Canada, *Model Code of Professional Conduct*, (2022), r 3.3-1; Law Society of British Columbia, *Code of Professional Conduct for British Columbia (the BC Code)*, (2013), ch 3, r 3.3-1; Law Society of Alberta, *Code of Conduct* (2023), ch 2, r 2.03(1); Law Society of Manitoba, *Code of Professional Conduct* (2011) , ch 3, r 3.3-1; Law Society of Ontario, *Rules of Professional Conduct* ch 3, r 3.3-1; *Loi sur le Barreau*, LRQ, c B-1, art 131; *Loi sur le notariat*, LRQ, c N-3, art 14.1; Law Society of Prince Edward Island, *Code of Professional Conduct* (2020), ch 3, r 3.3-1; Law Society of New Brunswick, *Code of Professional Conduct* (2023) ch 3; Nova Scotia Barristers' Society, *Code of Professional Conduct*

territorial law society, and specifically in 3.3-1 of the Federation's Model Code of Professional Conduct and 3.3-1 of the Law Society of British Columbia's Code of Professional Conduct, legal professionals are permitted to divulge confidential information if required by law.

83. Accordingly, despite the applicant's position, it is clear based on the applicable Codes of Professional Conduct, that they all accept that confidential information can be disclosed in circumstances where the law requires it, such as the present case. If the applicant's (and the law societies it represents) own code of professional conduct permits for such disclosure by a legal professional, it cannot be said that such a requirement would violate the sanctity of the lawyer-client relationship, as argued by the applicant.

84. Additionally, although the applicant argues that there will be a conflict of interest wherever legal professionals are uncertain of their obligation to report a transaction or uncertain of what the content of that report should be,[80] this is in the usual course of a legal professional's duties to make such decisions. Determining whether a transaction constitutes a reportable or notifiable transaction would no doubt be part of the responsibility of a legal professional while advising on such a transaction. Having made such a determination for the client, the legal professional would be in a position to determine their obligation to report and what is required to be disclosed to the CRA.

85. This includes the ability to determine if any information respecting the reportable transaction is subject to solicitor-client privilege, which is in the usual course of a legal professional's expected duties. The applicant complains that the information return required to be filed by the parties treads into issues on which legal

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(2023), ch 3, r 3.3-1; Law Society of Newfoundland and Labrador, *Code of Professional Conduct*, (2020), ch 3, r 3.3-1; The Canadian Bar Association, *Code of Professional Conduct* (2009), ch IV, r 1, Law Society of the Northwest Territories, *Code of Professional Conduct*, ch 3, Law Society of Nunavut, *Code of Conduct* (2022), ch 3, Law Society of Yukon, *Code of Conduct*, (2022) ch 3.

[80] Federation's written arguments at para 90.

professionals advise their clients;[81] however, that can be addressed if the legal professional reasonably believes that the information is subject to solicitor-client privilege by relying on the disclosure exemptions for solicitor-client privilege available under subsections 237.3(17) and 237.4(18). In addition, while tax advice might have been provided by a legal professional or accountant in order to facilitate the transactions, and while tax advice may be necessary for a taxpayer to interpret sections 237.3 or 237.4 or even Form 312, the information disclosed on the form is not tax advice.

86. The Federation's complaints of the difficulty of determining what constitutes a reportable or notifiable transaction, including that it requires tax law expertise,[82] highlights the type of transactions that the Minister is requiring disclosure of. These transactions are not normal commercial transactions.[83] Normal commercial transactions that do not pose an increased risk of abuse, in and of themselves, are not intended to result in a reporting obligation. Moreover, if a transaction exhibits no hallmark, the reportable transaction regime in section 237.3 is not engaged. The risk of inadvertently falling within the reportable transaction rules is illusory. The mandatory disclosure rules concern specific types of aggressive tax avoidance or abusive avoidance transactions that require sophisticated tax planning. As such, the reporting requirements will focus on tax practitioners who assist clients with specific tax-driven avoidance transactions.

87. Despite the Federation's argument that legal professionals will suffer irreparable harm due to the potential exposure to monetary penalties for non-compliance with the requirement, legal professionals are protected from penalty under subsection 237.3(11) for a failure to file an information return in respect of a reportable transaction if they exercised the degree of care, diligence and skill to prevent the failure to file that a reasonably prudent person would have exercised in comparable circumstances. In addition, subsection 237.4(7) protects advisors and promoters by

[81] Federation's written arguments at para 82.
[82] Federation's written arguments at para 90.
[83] Explanatory Notes, at 71.

not requiring them to file an information return to report a notifiable transaction unless they know or should reasonably be expected to know that the transaction was a notifiable transaction. Where there is no obligation to report on a notifiable transaction, there is no risk of penalties to legal professionals.

88. The applicant also raises the possibility that legal professionals would be subject to imprisonment under section 238 for non-compliance with sections 237.3 and 237.4. However, even if a remote risk to liberty exists, it does not outweigh the importance of these provisions and does not justify the suspension of these rules. The information required under sections 237.3 and 237.4 is validly needed and important to administer the tax regime. To be effective, self-enforcing regulatory schemes such as the *ITA* require not only resort to adequate investigation, but also the existence of effective penalties. Section 238 exists not to penalize criminal conduct but to enforce compliance with the Act.[84] The presence of section 238 does nothing to alter the regulatory or administrative nature of the mandatory disclosure rules nor lessen the necessity of the legislation in order for the Minister to administer the *ITA*.

IV. Legal Professionals Can Take Steps to Mitigate the Risk of Harm

89. The Federation argues that the Amendments create legal, ethical and practical issues that lead to a conflict of interest between legal professionals and clients that causes irreparable harm. For example, practitioners and their clients may disagree as to whether a particular transaction must be reported.

90. Legal professionals have a duty to be honest and candid when advising their clients. They must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.[85] Accordingly, as a part of their duty to their clients, legal professionals have an obligation to advise their clients during the

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[84] McKinlay, at 640-641.

[85] Federation of Law Societies of Canada, Model Code of Professional Conduct, (2022), r 3.2-2; Law Society of British Columbia, *Code of Professional Conduct for British Columbia (the BC Code)*, (2013), ch 3, r 3.2-2.

course of the solicitor-client relationship of the legal risks and implications respecting the matter that the legal professional has been retained to handle. In the present scenario, a legal professional advising a client respecting a tax avoidance transaction would be required to advise not only of the tax implications but also any reporting obligations that might be triggered by the transaction.

91. In addition, prior to the Amendments, there were already mandatory disclosure rules in place respecting reportable transactions that applied to legal professionals. The amendments to section 237.3 do not materially change the disclosure obligations of the taxpayer, advisor or promoter. Legal professionals have also had notice of the legislative changes since at least June 2023 when Bill-C47 was enacted. As such, legal professionals have had reasonable opportunity to adapt their client management practice to address these requirements, including informing their clients at the outset and throughout the retainer, of these reporting requirements and what information will need to be disclosed to the CRA in the prescribed form. The legal professional also has the ability to set out in their retainer agreement what happens if there is a disagreement between the legal professional and the client over what is reportable to the CRA. This minimizes any risk to the legal professional of inadvertent disclosure or conflicts with the client.

92. The clients have knowledge of what is required to be reported because the client has the same reporting obligations. Thus, the legislation does not create conflicting interests with clients, such that there is misuse of confidential information or risk of impairment of the lawyer's representation of the client or their duty of undivided loyalty.

93. There is no cogent evidence to support the allegations of harm to legal professionals and the public. The alleged harms are premised on a mischaracterization of the legislative requirements and a misplaced comparison to a wholly different reporting regime with different consequences. In addition, according to the Federation, harm to the public interest is predicated on conflict in and damage to the solicitor-client relationship. Due to the protections built into the *ITA* and actions that a legal

professional can take to minimize risk, it is speculative at this point to assume that the alleged harm will occur. The applicant has not demonstrated on the evidence that such harm or conflict will occur.

D. Balance of Convenience Favours the Respondent

94. If the Federation establishes irreparable harm, the court must consider the balance of convenience and determine which of the parties will suffer greater harm from the granting or refusal of the interlocutory injunction.[86]

95. Relevant factors vary from case to case but include the nature of relief sought, the harm to the parties, and the nature of the statute at issue. The weight attributed to any particular consideration is assessed on a case-by-case basis.[87]

96. The Federation argues that the alleged strength of its *Charter* argument should be considered in the balance of convenience analysis.[88] This factor should be given little to no weight in the assessment of the balance of convenience in this case. The assessment of the relative strength of the parties' cases must recognize the degree to which those cases have not yet been revealed because of the nature of the evidence and the way it has been presented on the injunction application, which may be markedly different from the way it would be presented at trial.[89]

97. The public interest is taken into account at this stage.[90] In constitutional cases, the public interest is a special factor which must be considered in assessing where the balance of convenience lies.[91]

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[86] *RJR-MacDonald,* at 342.
[87] *AstraZeneca Canada Inc. v Apotex Inc.*, 2011 FC 505 at para 64.
[88] Federation's written arguments at para 152.
[89] *Canadian Broadcasting Corp. v. CKPG Television Ltd*., 1992 CanLII 560 (BCCA) at 10.
[90] *RJR-MacDonald,* at 343.
[91] *RJR-MacDonald,* at 343.

98. A party may "tip the scales of convenience in its favour" by demonstrating a compelling public interest in granting or refusing the relief sought.[92]

99. Laws enacted by democratically elected governments are assumed to be directed to the common good and serve a valid public purpose, thus, interlocutory injunctions are rarely granted in constitutional cases.[93]

100. When the nature and declared purpose of legislation is to promote the public interest, the court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so.[94]

101. On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect. On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights.[95]

102. This is not one of the rare cases where blatant *Charter* violations warrant an interlocutory injunction.

103. The balance of convenience favours refusing the injunction for two reasons:

    a. the Amendments serve an important purpose and are in the public interest; and

    b. the harm alleged by the Federation does not outweigh the public interest in this important legislation.

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[92] *RJR-MacDonald,* at 344.
[93] PCA Injunction Decision, at para 85.
[94] *RJR-MacDonald,* at 348-349.
[95] *RJR-MacDonald,* at 333-334.

I. The Amendments Serve an Important Purpose and Are in the Public Interest

104. Parliament has imposed a duty on the Minister pursuant to subsection 220(1) of the *ITA* to administer and enforce the *ITA*.[96] Section 245 of the *ITA*, the GAAR, exists to protect the integrity of the Canadian income tax system.[97] The GAAR operates to deny tax benefits flowing from transactions that comply with the literal text of the Act but nevertheless constitute abusive tax avoidance.[98] The GAAR was intended to protect the integrity of the tax system and fairness to taxpayers, and to relieve Parliament of the need to continually respond to new tax schemes with specific legislative responses because that leads to an endless cycle of action-reaction.[99]

105. In order to administer the *ITA*, including to respond quickly to tax risks and consider whether the GAAR might apply, the Minister must first know about transactions through sufficient, relevant and timely information. This is where the Amendments play an important role. However, mandatory disclosure rules also stand apart from the GAAR and serve their own independent purposes.

106. The nature and purpose of the Amendments is to improve the collection of information on aggressive tax planning, enable the CRA to better detect and prevent abuse of the Act, and increase fairness in the Canadian tax system. The Amendments are assumed to be directed to the common good and serve a valid and important public purpose.[100]

107. As noted above, the reporting obligations in the Amendments in general target transactions that are likely to be abusive (or which may be abusive) because they are avoidance transactions with a hallmark of tax-motivated, non-commercial

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[96] *Canada (Attorney General) v Collins Family Trust*, 2022 SCC 26 at para 25.
[97] *Deans Knight Income Corp. v.* Canada, 2023 SCC 16 (***Deans Knight***) at para 45.
[98] *Deans Knight,* at para 4.
[99] *Deans Knight,* at paras 4 and 40-52.
[100] *RJR-MacDonald,* at 348-349.

features (reportable transactions), and transactions that are already known or suspected to be abusive forms (notifiable transactions).

108. Reportable transactions are avoidance transactions which have two requirements to trigger a reporting obligation: that a main purpose of the transaction was to obtain a tax benefit and the presence of one of three legislated hallmarks.

109. The hallmarks – including contingency fees based on tax benefits and confidentiality protection prohibiting the disclosure of the details or structure of a transaction – make clear that reportable transactions are not normal commercial transactions. The hallmarks identify highly aggressive transactions.

110. However, if none of the hallmarks is present, there is no reporting obligation, even if one of the main purposes of the transaction is to obtain a tax benefit. Further, as noted above, there are many exceptions to each of the hallmarks to allow for normal commercial transactions to occur without triggering reporting obligations.

111. Notifiable transactions are transactions which the Minister has the authority to designate by actually describing the transactions which the Minister wishes to investigate. According to the CRA, the Minister will designate transactions that have been found to be abusive, or which are potentially abusive.

112. Abusive tax avoidance can result when transactions result in an abuse of the provisions of the *ITA*. As stated by the Supreme Court:[101]

> *the avoidance transactions will be abusive where the outcome or the result of the avoidance transaction "(a) is an outcome that the provisions relied on seek to prevent; (b) defeats the underlying rationale of the provisions relied on; or (c) circumvents certain provisions in a manner that frustrates the object, spirit and purpose for those provisions.*

[101] *ITA*, s 245(4); *Deans Knight,* at para 69.

113. As with reportable transactions, notifiable transactions are not normal commercial transactions. As indicated by the Sample Notifiable Transactions identified above, each such transaction is designed to generate tax benefits in a manner which the Minister has found to be abusive or potentially abusive.

114. It is fundamental to the integrity of the Canadian tax system for the Minister to obtain timely information on arrangements that involve high-risk aggressive tax planning to enable the CRA to act against any aggressive or abusive tax planning strategies. This information will enable CRA to perform informed risk assessments and audits, and consider responsive legislative amendments.

115. If the injunction is granted, the CRA and the public would be deprived of an unknown amount of reporting by legal professionals with respect to these avoidance and abusive transactions. The CRA would not be able to use this reporting to fulfill its duty to ensure taxpayer compliance. Further, if others do not report transactions as required by the Amendments, an unknown number of transactions may go entirely unreported to the CRA.[102]

116. The Federation argues that Canada:[103]

> *"… 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 Amendments have] been enacted in the public interest. [Canada] has not even introduced evidence that the CRA or the Minister is charged with promoting or protecting the public interest or that the [Amendments] were undertaken pursuant to that responsibility, both of which are a prerequisite to reliance on any assumption as to the public interest.*"

[102] *ITA*, ss 152(3.1) and 152(4).
[103] Federation's written arguments at para 152.

117. In response to this argument, Canada makes two counterarguments. First, the Federation bears the onus of proving the requirements of an interlocutory injunction. Canada is not under any requirement to file affidavit evidence on this application.

118. Second, affidavit evidence is not required to establish the presumption that the Amendments are directed to the common good and serve a valid and important public purpose. The Federation cites *Cambie Surgeries Corporation v British Columbia (Attorney General)*, 2018 BCSC 2084 at para 137 in support of its argument on this point which states (emphasis added):[104]

> *In other words, on an interlocutory application for injunctive relief in a Charter case, a court is required to assume irreparable harm to the public interest if the government action is restrained (so long as there is proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility). …*

119. *Cambie Surgeries* cites *RJR-MacDonald* at page 346 for this principle,[105] which provides (emphasis added):

> *In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the*

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[104] *Cambie Surgeries Corporation v British Columbia (Attorney General)*, 2018 BCSC 2084 (***Cambie Surgeries***) at para 137.
[105] *Cambie Surgeries,* at para 136.

> *court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.*

120. These cases do not say that the "proof" and "indication" of these points must be established on affidavit evidence. In this case, Canada has established these points – and that the Amendments are directed to the common good and serve a valid and important public purpose – by citing permissible extrinsic aids.[106] Contrary to the Federation's assertion,[107] these are not speculative statements without evidentiary foundation. It follows that, according to *RJR-MacDonald* and *Cambie Surgeries*, the court should assume that irreparable harm to the public interest would result from the restraint of the Amendments.

II. The Harm Alleged by the Federation Does Not Outweigh the Public Interest in This Important Legislation

121. The public interest in this important legislation outweighs the harm alleged by the Federation.

122. The harm to the public argued by the Federation is predicated on harm to the solicitor-client relationship and conflicts of interest between legal professionals and clients. As already noted, the Amendments contain strong protections to the solicitor-client relationship, including exemptions for solicitor-client privileged information, concurrent and identical reporting requirements for all reporters, due diligence protection under subsection 237.3(11) and reasonable knowledge protection under subsection 237.4(7). These protections – paired with the practical

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[106] Courts are entitled to rely on permissible extrinsic aids in determining legislative purpose. For example, as discussed in *R v Sharma*, 2022 SCC 39 at paras 88-91, the most significant and reliable indicator of legislative purpose would be a statement of purpose within the subject law. Beyond that, generally, courts seeking to identify legislative purpose look to the text, context, and scheme of the legislation and extrinsic aids, which can include Hansard, legislative history, government publications and the evolution of the impugned provisions. Extrinsic aids should be used with caution as statements in the legislative record may be rhetorical and imprecise. Decontextualized statements by members of Parliament can be poor indicators of parliamentary purpose.

[107] Federation's written arguments at para 153.

steps legal professionals regularly take to minimize and eliminate the risk of conflicts with clients – mitigate any potential harm to the solicitor-client relationship vis-à-vis the Amendments. As a result, harm to the public interest would not materialize if the injunction were refused.

123. Despite the fact that this is an exemption case, the granting of the injunction would have significant consequences that make it more akin to a suspension case. As such, public interest considerations should weigh more heavily as they do in an exemption case.

124. As outlined above, the Amendments do not target normal commercial transactions. They target tax-driven transactions that are likely to be abusive or that may be abusive.

125. The Amendments target taxpayers, advisors and promoters who undertake tax planning schemes that are likely to be abusive or that may be abusive and require them to report these transactions. The public interest in the success of our tax system and the full and complete reporting of these types of transactions weighs heavily in favour of refusing the injunction.

126. In these circumstances, the balance of convenience favours refusing the injunction.

V. THE REQUESTED INJUNCTION IS OVERBROAD

127. The Federation says the injunction sought is narrow in scope and is simply a continuation of the existing consent order for a temporary interim injunction.

128. As noted above, Canada advised the Federation that its agreement to the temporary interim injunction was expressly on the basis that doing so did not constitute an admission of the merits of the substantive injunction application, nor agreement to or acknowledgment of the need for a further injunction, and was not a waiver or restriction of any positions that Canada may take. Further, agreeing to a time-limited

injunction for two months which is broader in scope cannot be taken as agreement to the terms of an indeterminate interlocutory injunction pending the Court's decision of the petition on the merits.

129. The terms of the temporary interim injunction should not be relied upon in determining whether the injunction sought by the Federation on this application should be granted or the terms of any injunction.

130. The Federation seeks the following declarations:

    a. "an interlocutory declaration that legal professionals are exempt from operation of the amendments to section 237.3 and 237.4 of the [*ITA*] introduced by Bill C-47 [definition omitted], as the [Amendments] applies to legal professionals, pending the hearing of the Federation's petition with respect to the constitutional validity of the [Amendments], filed herein; and"

    b. "an interim declaration that legal professionals are exempt from operation of the [Amendments] pending the Court's decision on the within application."

131. The requested declarations are overbroad. Legal professionals may not always solely act in an advisory or representative capacity with respect to reportable or notifiable transactions. The requested declarations, as drafted, could be interpreted as exempting legal professionals from the disclosure of reportable and notifiable transactions in circumstances where they are not solely advising or representing clients.

132. For example, a lawyer or other legal professional may act as a promoter of a reportable or notifiable transaction. A promoter is a person who "promotes or sells (…) an arrangement plan or scheme".[108] When acting as a promoter, a legal professional is not acting in an advisory or representative capacity to the taxpayer who ultimately enters into the reportable or notifiable transaction. As framed, the

[108] *ITA*, s 237.3(1) "promoter".

declarations could be read as exempting legal professionals from the reporting obligations contained in the Amendments even when acting as a promoter.

133. The declarations may also be interpreted as exempting legal professionals who are participating in reportable and notifiable transactions in their personal capacity for their own benefit or for the benefit of another person. Legal professionals are just as susceptible to participating in transactions designed to generate tax benefits as other taxpayers. No public interest justifies the creation of a privileged class of taxpayers entitled to cloak their avoidance transactions in secrecy.

134. Legal professionals acting in such capacities described above are advancing their own business or personal tax interests. As such, the interlocutory declarations sought go beyond what is necessary to prevent any purported conflict between the Amendments and a lawyer's duty of commitment to the client's cause.

135. Canada opposes the Federation's request for an interim injunction. However, if the Court is inclined to grant an injunction, Canada submits that the interlocutory injunction should be narrowed such that the interlocutory declaration would only exempt legal professionals from the operation of the amendments introduced by Bill C-47 to the extent the disclosure obligations of the legal professional, acting in a legal capacity, arises from the definitions of "advisor" in subsections 237.3(1) and 237.4(1).

136. This narrower injunction would be consistent with the ultimate relief sought by the Federation in its petition where the Federation seeks, amongst other things:

> "1. [a] declaration that sections 237.3 and 237.4 of the *Income Tax Act* […] are inconsistent with the Constitution of Canada, and of no force or effect, to the extent that those sections apply to legal professionals"; and
>
> "2. [a] declaration that the term "advisor" as it is used in sections 237.3 and 237.4 of the *ITA* be read down so as to exclude legal professionals."

137. While Canada opposes the granting of an injunction, the narrower terms outlined above would be consistent with paragraph 2 of the Federation's ultimate relief sought on the Petition, specifically that the definitions of "advisor" in the Amendments be read down to exclude legal professionals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Vancouver, the Province of British Columbia, this 13th day of October, 2023.

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