



This is the 1<sup>st</sup> affidavit of  
Jill Perry in this case and was  
made on September 11, 2023

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

**AFFIDAVIT**

I, Jill Perry, K.C., of 401-15 Dorchester Street, Sydney, NS B1P 5Y9, lawyer, AFFIRM THAT:

1. I am the President of the Federation of Law Societies of Canada (the "**Federation**"), the petitioner in this proceeding. As such, I have personal knowledge of the facts in this affidavit except where I have indicated that those facts are based on information provided to me, in which case I believe those facts to be true.

**A. Professional Background and Role with the Federation**

2. I received a Bachelor of Laws from the University of Victoria in 2000.

3. I was called to the Nova Scotia bar 2001. Since 2001, I have worked as a lawyer with Nova Scotia Legal Aid in Sydney, Nova Scotia. I have been the Managing Lawyer (Family) of the Sydney Main Office since 2013.

4. I served as President of the Nova Scotia Barristers' Society in 2015-2016. In March 2018, I was appointed as the nominee of the Nova Scotia Barristers' Society on the Council of the Federation (the "**Council**"). The Council is the governing board of the Federation and is comprised of members representing each of the 14 law societies throughout Canada.

5. After serving two years on the Federation Executive as 2<sup>nd</sup> and 1<sup>st</sup> Vice President, I became President of the Federation for the 2022-2023 term (November 15 2022 to November 15 2023). I have also sat on and/or chaired various Federation committees, including the National Committee on Accreditation, the Continuing Legal Education Programs Committee, the Canadian Common Law Program Approval Committee, and the National Action Committee on Access to Justice in Civil and Family Matters.

6. In 2023, I was an invited lecturer at the annual F. Murray Fraser Lecture in Professional Responsibility at the University of Victoria.

7. A copy of my Curriculum Vitae is attached to this Affidavit as **Exhibit "A"**.

**B. Mandate of the Federation and Interest in this Proceeding**

8. The Federation is a federal not-for-profit corporation governed by the *Canada Not-for-profit Corporations Act*, SC 2009, c 23.

9. The Federation is the national association of 14 provincial and territorial bodies governing the legal professions in Canada (including Quebec notaries and Ontario paralegals). Its members have statutory authority in their respective jurisdictions to regulate a total of over 136,000 lawyers in Canada, and an additional 4,200 notaries in Quebec and 10,600 paralegals in Ontario. The Federation governs its affairs through the Council and an executive.

10. Each of the Federation's member law societies have a statutory mandate to regulate the legal profession in the public interest. As the national association of these law societies, the Federation's mission is also to serve the public interest, in particular by strengthening Canada's system of governance of an independent legal profession, reinforcing public confidence in the legal profession and making Canada a leading example for justice systems globally.

11. To achieve its mission, the Federation is committed to:

- a) Acting as a coordinator and facilitator among members, establishing forums such as conferences, committees and other opportunities for dialogue where representatives of the members may discuss issues of mutual interest and foster collaborative decision-making;
- b) Promoting the development of national standards and encouraging the harmonization of members' rules and procedures;
- c) Acting as the agent of all or some members to undertake initiatives when all members so agree;
- d) Raising members' awareness of emerging issues that may warrant their attention, including important legislative or regulatory developments or trends;
- e) Speaking on behalf of members, when so mandated by members, in Court proceedings and before parliamentary committees on matters that touch on core values and regulation of the legal professions;
- f) fostering and maintaining constructive relationships with key national stakeholders, such as the Canadian Bar Association, the federal Department of Justice, the Supreme Court of Canada and other federal courts, the Indigenous Bar Association and the legal academy, and more generally to provide information and raise awareness about the role, responsibilities and activities of the Federation among the public, governments, and members of the legal profession; and
- g) Participating in international forums for the purposes of: (i) learning about international trends and developments in the regulation of legal professions and sharing that information with members; and (ii) providing information and raising awareness about the role, responsibilities and activities of the Federation and its members, as well as about the Canadian justice and legal system, among organizations having an interest in such matters around the world.

12. In furtherance of its commitment to promote the harmonization of members' rules and procedures, the Federation publishes and maintains the *Model Code of Professional Conduct* (the “**Model Code**”). The Federation maintains the Model Code, in collaboration with its members, to harmonize professional rules of conduct governing legal professionals across Canada. The Federation's Standing Committee on the Model Code regularly reviews the Model Code to ensure

it responds to best practices and emerging issues in legal practice and ethics. A copy of the Model Code is attached to this Affidavit as **Exhibit "B"**.

13. In this proceeding, the Federation challenges the provisions of Bill C-47 as they apply to Canadian legal professionals. As I understand will be discussed in greater detail in Affidavit #1 of Michael Colborne in this proceeding (the "**Colborne Affidavit**"), Bill C-47 (among other things) amended section 237 of the *Income Tax Act*, R.S.C., 1985, c. 1 ("**ITA**") to expand reporting requirements applicable to legal professionals with respect to "reportable transactions" and add a reporting requirement with respect to "notifiable transactions" (the "**New Legislation**"). I have reviewed a draft of the Colborne Affidavit and agree with its contents.

14. The Federation is deeply concerned that the New Legislation will cause significant harm to the Canadian public by undermining the solicitor-client relationship, the lawyer's duties of loyalty and commitment to the client's cause, and the independence of the bar.

15. The Federation understands and supports the government's policy objective to address aggressive tax planning by requiring taxpayers and advisors to report to the Canada Revenue Agency (the "**CRA**") about certain transactions. However, the Federation believes that requiring legal professionals to report their client's confidential information to the government, on pain of penalty or imprisonment, undermines the unique relationship between clients and legal professionals – a relationship of fundamental importance in upholding the rule of law. The Federation is concerned that enforcing the New Legislation against legal professionals will erode the duty of commitment to the client's cause in a manner that is inconsistent with the principles of fundamental justice, which protect the Canadian public from governmental overreach.

16. The Federation's mandate makes it particularly suited to act as the petitioner in this proceeding. The constitutional question at issue in this proceeding is specific to the New Legislation's effect on the Canadian legal professions and, in turn, the Canadian public, whose interests the Federation and its members are mandated to protect.

17. The Federation's commencement of this proceeding was approved by a unanimous motion of its members – the 14 law societies of Canada.

**C. Federation's Prior Challenges to Mandatory Disclosure Laws**

18. The New Legislation is not the federal government's first attempt to require legal professionals to disclose their client's confidential information to federal authorities. It is also not the Federation's first constitutional challenge of such legislation.

19. In 2000, Parliament adopted the *Proceeds of Crime (Money Laundering) Act*, S.C. 2000, c. 17, which was subsequently renamed the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (collectively, the "**PCA**"). The PCA imposed duties on legal professionals to collect, record and retain confidential client material, including client identification and verification material, whenever legal professionals received or paid funds, or gave instructions regarding the receipt or payment of funds, on behalf of any person. It also created a federal agency ("**FINTRAC**") empowered to search for and seize that material, and imposed fines and penal consequences for non-compliance.

20. Legal professionals first became subject to the PCA in November of 2001, at which time they became required to report "suspicious transactions" to FINTRAC. The Federation and several law societies commenced constitutional challenges to the PCA in courts across Canada. On November 20, 2001, the British Columbia Supreme Court granted an interlocutory injunction sought by the Federation and the Law Society of B.C., which exempted legal counsel in British Columbia from the application of the impugned provisions of the PCA: *Law Society of British Columbia v. Canada (Attorney General)*, 2001 BCSC 1593. The Federation and its members obtained similar injunctions in Ontario, Nova Scotia, and Saskatchewan.

21. To resolve the constitutional challenges across Canada efficiently, the Federation and the Attorney General of Canada entered into an agreement whereby the challenges would all be resolved by way of a national "binding test case" before the courts of British Columbia. The agreement also provided that the Attorney General of Canada consented to interlocutory injunctions on the same terms as the British Columbia injunction in all remaining jurisdictions where injunctions had not been granted. A copy of the agreement is attached to this Affidavit as **Exhibit "C"**.

22. Following the injunction and the agreement, the federal government revised the suspicious transaction reporting requirement so that it did not apply to legal professionals. On May 13, 2005, the British Columbia Supreme Court granted a consent order that adjourned the hearing of the national "binding test case" *sine die*, on the conditions that:

- a) if a new set of regulations affecting legal counsel or law firms was enacted under the PCA, without the consent of the Federation and the intervenors, the coming into force of such regulations would be deferred until the constitutional validity of the PCA and regulations had been determined by the Court;
- b) if it become necessary in order to maintain the *status quo* the Attorney General of Canada would consent to interlocutory injunctions exempting legal counsel and law firms from the application of the PCA and its regulations; and
- c) each party to the proceeding would be entitled to re-set the proceeding for hearing on a date not earlier than one year later than the date the proceeding is re-set for hearing.

A copy of the consent order is attached to this Affidavit as **Exhibit “D”**.

23. Later, the government adopted client identification and verification requirements, which it sought to make applicable to the legal profession. These requirements were then subject to the national “binding test case” that was heard by the British Columbia Supreme Court in 2011. The Court found that the impugned provisions of the PCA were unconstitutional as they applied to lawyers: *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2011 BCSC 1270.

24. The Supreme Court of Canada ultimately concluded that the impugned provisions of the PCA were unconstitutional in that they were both an unreasonable search and seizure (in violation of section 8 of the *Charter of Rights and Freedom*), and limited the liberty of lawyers in a manner that was not in accordance with the principles of fundamental justice, specifically by undermining the lawyer's ability to comply with their duty of commitment to the client's cause (in violation of section 7 of the *Charter*).

25. In addition to its successful constitutional challenge of the PCA, the Federation has also intervened in a number of cases at the Supreme Court of Canada (and lower courts) to advocate for legal professionals and the protection of the public interest, including by seeking to protect the sanctity of solicitor-client privilege. These cases include:

- a) *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53;
- b) *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20;

- c) *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23;
- d) *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44;
- e) *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, 2002 SCC 61;
- f) *Maranda v. Richer*, 2003 SCC 67; and
- g) *R. v. Brown*, 2002 SCC 32.

**D. History of Bill C-47 and Disclosure Requirements with respect to Avoidance Transactions**

26. In 2013, Parliament adopted legislation adding section 237.3 to the ITA (the “**Old Legislation**”). Section 237.3 established mandatory disclosure rules regarding “reportable transactions”. I understand that the mandatory disclosure rules under the Old Legislation will be described in further detail in the Colborne Affidavit.

27. In the 2021 federal Budget (the “**2021 Budget**”), the government announced public consultation on proposals to enhance the ITA’s mandatory disclosure rules. The government stated that public consultation would consider a proposal to change the ITA’s reportable transaction rules and introduce a new requirement to report “notifiable transactions”.

28. The 2021 Budget also stated the government’s view that the mandatory disclosure rules under the Old Legislation were not sufficiently “robust”, and described a so-called “dual reporting” approach to strengthen those rules. Specifically, the budget stated that requiring both the taxpayer and a promoter (and now presumably a legal professional) to make separate reports would enable the government to compare the promoter’s report to the taxpayer’s report:

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.

Extracts from the 2021 Budget, including containing the quote above, are attached to this Affidavit as **Exhibit “E”**.

29. The federal government introduced Bill C-47, *An Act to implement certain provisions of the budget*, in April 2023. Bill C-47 proposed the amendments to the ITA’s mandatory disclosure rules that had been announced in the 2021 Budget.

30. Bill C-47 received Royal Assent on June 22, 2023, bringing the New Legislation into force. I understand that the difference between the mandatory disclosure rules under the New Legislation as compared to the Old Legislation will be discussed in detail in the Colborne Affidavit.

**E. The Federation's Concerns with the New Legislation**

31. Attempting to comply with the New Legislation will create significant legal, ethical, and practical challenges for legal professionals. The Federation is also very concerned about the significant impacts the New Legislation will have on the legal profession's clients and the public generally.

32. The Federation raised concern with mandatory reporting rules for legal professionals under the ITA when they were first proposed by the federal government in 2010. On November 30, 2010, the Federation wrote to the Minister of Finance and stated its view that the proposed reporting rules would impose duties on legal professionals that were contrary to their duty to their clients, the independence of the bar, and the protection of solicitor-client privilege. A copy of this letter is attached to this Affidavit as **Exhibit "F"**.

33. The Federation has raised its concerns regarding the New Legislation since it was proposed. When the Federation's concerns were left unaddressed, the Federation notified the Minister of Justice and Attorney General of Canada of its intent to commence legal proceedings challenging the constitutionality of the New Legislation.

34. On April 7, 2022, the Federation made submissions on Bill C-47 to the Department of Finance. In those submissions the Federation asked that legal professionals be exempt from the reporting requirements imposed by the proposed amended section 237.3 and the proposed new section 237.4. A copy of this submission is attached to this Affidavit as **Exhibit "G"**.

35. On May 29, 2023, the Federation made submissions on Bill C-47 to the Senate Standing Committee on National Finance. In those submissions the Federation recommended that legal professionals acting in their capacity as legal counsel be removed from the mandatory reporting scheme created by the New Legislation. A copy of this submission is attached to this Affidavit as **Exhibit "H"**.

36. On August 17, 2023, I sent a letter to the Minister of Justice and Attorney General of Canada, copying the Minister of Finance. In this letter, I summarized the Federation's prior efforts to bring its concerns to the attention of both Cabinet and Parliament. I concluded that, as



these concerns had not been addressed and the New Legislation had received Royal Assent in late June of 2023, the Federation had decided to commence a constitutional challenge to the New Legislation. I reiterated that the Federation remained open to dialogue with the government to resolve its concerns regarding the New Legislation. A copy of the letter is attached to this Affidavit as **Exhibit "I"**. I did not receive a response to my letter.

37. The Federation had hoped to receive a response from the government that addressed the Federation's concerns and avoided the need for recourse to the courts. That has not occurred. The Federation now has no choice but to seek urgent injunctive relief.

**F. The Need for an Injunction and Declaration of Constitutional Invalidity**

38. The Federation believes that if the New Legislation is allowed to take effect against legal professionals, it will harm the independence of the bar, the solicitor-client relationship, and the Canadian public, as well as legal professionals themselves.

39. In addition to the effect of the New Legislation itself, the Federation is also concerned with the government intention underlying the New Legislation. Specifically, government statements leading to the passage of the New Legislation indicate that the purpose of certain amendments was to specifically target legal professionals as sources of confidential client information, and to use such information against clients.

***Impact on the Public***

40. I understand that the first possible reporting deadline under the New Legislation is September 21, 2023. If interlocutory injunctive relief is not granted prior to that date, and the New Legislation is allowed to remain in force against legal professionals, the public interest, legal professionals, and each of Canada's law societies, will be severely impacted during the interim period while this proceeding awaits final determination. These impacts include:

- a) Legal professionals will be placed in an immediate conflict between their constitutional duty of commitment to their client's cause and their duty to report under the New Legislation. Interim enforcement of the New Legislation will compel legal professionals by threat of penalty or imprisonment to breach this constitutional duty, while the determination of constitutionality of the New Legislation remains pending.

- b) The New Legislation will place legal professionals in an irreconcilable conflict of interest with their clients. To the extent that legal professionals disclose confidential client information to the government under the New Legislation, lawyers may be compromised in their ability to continue to act with undivided loyalties and may have to withdraw from their representation of the client. Even if the Federation is ultimately successful in this litigation, the breach of loyalty that occurs in the meantime cannot be cured. Both the individual solicitor-client relationship and broader public confidence in the independence of legal professionals from the state will be permanently injured.
- c) Information disclosed prior to the hearing of the Petition cannot be retracted once it is in the hands of governmental authorities, and the government cannot disabuse itself of the knowledge it has gained through such disclosure.
- d) Legal professionals may disclose privileged information to the government where the claim of privilege over the information is not clear, even where the client has not waived privilege. The New Legislation incentivizes lawyers to disclose potentially privileged information to avoid governmental investigation and sanction. The disclosure of potentially privileged information to the government is severely problematic in that the information cannot be retracted, and any privilege that originally attached to the information may be waived by the disclosure.
- e) "Information returns" filed by legal professionals while the Petition is pending would provide the government with a permanent record of potentially incriminating evidence. Authorities may then use this information to investigate the client, even if the New Legislation is ultimately found to be unconstitutional.
- f) Legal professionals can be subject to significant fines and potential imprisonment for failing to report during the interim period, even if the professional reasonably believes that reporting would violate their duty of commitment to their client's cause. Such charges can permanently injure the reputation and integrity of those legal professionals even though this Court may ultimately rule the New Legislation is unconstitutional.
- g) Given the significant liability they may face under the New Legislation, legal professionals may simply decide not to provide legal services during the interim

period on any matter that could be captured by the New Legislation's reporting rules, even in situations where there is merely some aspect of the matter that could be reportable. This will harm clients during the interim period, who may not be able to access legal services in respect of their affairs.

- h) There will be a chilling effect on clients' ability to consult with their lawyers fully and freely, and clients may withhold information knowing that the information may be reported to authorities, to the detriment of their ongoing and future legal representation. Clients may avoid obtaining legal advice on certain topics during the interim period, for fear that legal professionals will disclose their confidences to the government. This will negatively impact those clients' legal rights, interests and representation in legal matters.
- i) As the New Legislation creates a conflict of interest between lawyer and client, clients' legal matters may be prejudiced by the manner in which legal professionals conduct the client's affairs during the interim period. Clients will be left in a state of uncertainty regarding whether the legal advice they received was influenced by the legal professional's own self-interest in avoiding sanction.
- j) The public confidence in and perception of the independence of the bar will be harmed. Once the public knows that the government has the power – even if that power is time-limited – to conscript their counsel against them and access client confidences, the public's trust in legal professionals and the administration of justice will be permanently injured.

41. The Federation is not aware of any prejudice to the government or the public interest that would result from a delay in the application of the mandatory reporting rules in the New Legislation to legal professionals, pending the determination of the Petition.

**G. Undertaking as to Damages**


42. The Federation is a not-for-profit corporation. It is not financially feasible for the Federation to provide an undertaking as to damages.

43. I am not aware of any damages the government would suffer should the Federation be successful in obtaining injunctive relief with respect to the Petition or how any alleged damages

would be calculated. In any event, the Federation is unable to provide an undertaking for damages and would not be able to pay any damages alleged to be suffered by the federal government.

44. I provide this evidence in support of the Federation's challenge to the constitutional validity of the New Legislation as it applies to legal professionals, and in support of the Federation's application for interlocutory injunctive relief.

**AFFIRMED** by Jill Perry in the City of Sydney, in the Province of Nova Scotia before me at the City of Toronto, in the Province of Ontario, on September 11, 2023, in accordance with O.Reg. 431/20, Administering Oath or Declaration Remotely.

  
Jill Perry

Sahil Kesur

## A Commissioner for taking Affidavits and Notary Public for the Province of Ontario

Sahil Kesar, LSO# 83583C