This is the 1st affidavit of
Michael Colborne 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, Michael Colborne, of 181 Bay St., Toronto, ON M5J 2T3, lawyer, SWEAR THAT:

1. I am a lawyer who specializes in corporate and international tax planning at Thorsteinssons LLP ("**Thorsteinssons**"), a leading Canadian national tax law firm. 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. Educational Background and Professional Experience

2. I received a Bachelor of Laws from the University of Manitoba in 1996 and a Master of Laws in taxation from New York University in 1999. I also completed a clerkship at the Federal Court of Canada in 1997.

3. I am a member of both the British Columbia and Ontario bars. I was called to the British Columbia bar in 1998 and the Ontario bar in 1999.

4. I am a senior partner at Thorsteinssons. I began working at Thorsteinssons in 1997 as an articling student and joined the partnership of the firm in 2005. Between 2017 and 2021, I was the managing partner of Thorsteinssons.

5. Throughout my legal career, my work has focused on corporate and international tax planning. I regularly advise Canadian and foreign-based multi-national entities and individuals on a variety of tax matters, including financing, mergers and acquisitions, and re-organizations. I also have experience in Canadian tax disputes and have appeared before the Supreme Court of Canada, Federal Court of Appeal, Tax Court of Canada, the Supreme Court of British Columbia and the Superior Court of Ontario.

6. I have expertise in matters of tax policy. I have advised both taxpayers and governments on legislative and tax policy matters. I frequently speak and write about tax law, and have presented papers for the Canadian Tax Foundation, International Fiscal Association, and International Bar Association. In 2007, I was named one of the leading lawyers under 40 in Canada by *Lexpert,* and have been repeatedly recognized in numerous industry publications such as *Chambers* and *Lexpert*.

7. I am a current council member of the International Fiscal Organization (Canadian Branch) and an adjunct professor at Osgoode Hall School of Law. I am also a former Governor of the Canadian Tax Foundation.

8. A copy of my Curriculum Vitale is attached to this Affidavit as **Exhibit "A"**.

B. Engagement in these Proceedings

9. Due to the nature of my legal practice and my other professional and academic activities, I regularly analyze and interpret the provisions of the *Income Tax Act,* R.S.C., 1985, c. 1 (the "**ITA**" or the "**Act**").

10. I have been asked by the petitioner the Federation of Law Societies of Canada (the "**Federation**") to provide evidence in this proceeding with respect to certain provisions of Bill C-47. Bill C-47 (among other things) amended section 237 of the ITA to expand the 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 provide this evidence in support of the Federation's challenge to the constitutional validity of the New Legislation as it applies to legal professionals.

11. I provide the evidence in this Affidavit on the basis of my extensive experience as a Canadian tax practitioner, as described above, and have not been instructed to make any assumptions with respect to the evidence I provide in this Affidavit.

12. My concerns set out in this affidavit with respect to the New Legislation pre-date my engagement by the Federation. I have previously written to the Law Society of Ontario to express certain of the concerns set out below. My partner from Vancouver, Ted Sutcliffe, has also written to the Law Society of British Columbia with respect to his concerns with respect to the New Legislation.

C. Background: 2013 Amendments to *ITA* regarding "Reportable Transactions"

13. The amendments to the ITA in the New Legislation and the reporting requirements they place on legal professionals are the most recent step in the federal government's attempt to obtain information from taxpayers and their advisors with respect to "avoidance transactions". I set out some of the relevant background on this issue below.

14. An "avoidance transaction" is defined in section 245 of the ITA, commonly referred to as the "General Anti-Avoidance Rule" ("**GAAR**"). The GAAR allows the CRA to modify the tax consequences of "avoidance transactions" if certain preconditions are met. The GAAR defines an avoidance transaction as any transaction that:

a) but for the GAAR, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit; or

b) that is part of a series of transactions, which series, but for the GAAR, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit.

15. In other words, the GAAR acts as a deterrent to taxpayers undertaking transactions solely to obtain a tax benefit.

16. In 2013, Parliament adopted legislation adding section 237.3 to the ITA, which established rules regarding "reportable transactions" (the "**Old Legislation**").

17. Under the Old Legislation, a "reportable transaction" was defined as an "avoidance transaction that is entered into by or for the benefit of a person, and each transaction that is part of a series of transactions that includes the avoidance transaction" if at any time any two of the following three features or "hallmarks" applied in respect of the avoidance transaction:

a) Fee: An advisor or promoter is entitled to a "fee" that is:

(i) based on the amount of a tax benefit that results, or would result but for section 245 [*i.e.* the application of the GAAR], from the avoidance transaction or series,

(ii) contingent upon the obtaining of a tax benefit that results, or would result but for section 245 [*i.e.* the application of the GAAR], from the avoidance transaction or series, or may be refunded, recovered or reduced, in any manner whatever, based upon the failure of the person to obtain a tax benefit from the avoidance transaction or series, or

(iii) attributable to the number of persons

A. who participate in the avoidance transaction or series, or in a similar avoidance transaction or series, or

B. who have been provided access to advice or an opinion given by the advisor or promoter regarding the tax consequences from the avoidance transaction or series, or from a similar avoidance transaction or series.

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

c) Contractual Protection: The taxpayer, the person who entered into the transaction on behalf of the taxpayer, or the promoter or advisor has or had a "contractual protection" in respect of the avoidance transaction (meaning, generally, any form of protection, including an indemnity or a guarantee, that protects a person from a failure of the transaction to achieve any tax benefit from the transaction, or pays

or reimburses any expense, fee, tax 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).

18. Pursuant to s. 237.3, under the Old Legislation any person for whom a tax benefit resulted (and every person who entered into a reportable transaction on behalf of another person) was required to disclose a reportable transaction by filing an information return to the Canada Revenue Agency ("**CRA**").

19. In addition to taxpayers, the Old Legislation applied to "advisors" and "promoters". "Advisors" include every advisor any person who provides any contractual protection in respect of a transaction or any advice or assistance with respect to developing or implementing a transaction. "Promoters" include any person who promotes any arrangement, plan or scheme that relates to a reportable transaction, makes statements with respect to a potential benefit from such an arrangement, plan or scheme, or accepts consideration in relation to such an arrangement, plan or scheme.

20. Every advisor or promoter who was entitled to a fee in respect of a reportable transaction was also required to file an information return (ITA, s. 237.3(2)(c)) if that fee was:

a) in the nature of a fee that would trigger the "Fee" hallmark, or

b) in respect of contractual protection that would trigger the "Contractual Protection" hallmark.

21. The statutory language with respect to the "Contractual Protection" hallmark can be read very broadly. Any advisor who receives a fee "in respect of" contractual protection provided to any party in that transaction may be required to report the transaction to the CRA.

22. However, under the Old Legislation, section 237.3(4) also provided that, if any person was required to file an information return in respect of a reportable transaction, the filing by any such person of a complete and accurate information return would be "deemed to have been made by each person" who was required to make that disclosure. As a result, lawyers were relieved of the obligation to file an information return with the CRA where their client or another advisor (for example, an accountant) had done so.

D. Amendments to ITA under Bill C-47

23. The federal government introduced Bill C-47 in April 2023. Bill C-47 proposed amendments to the ITA that expanded the mandatory disclosure rules in the Old Legislation. Bill C-47 received Royal Assent on June 22, 2023, bringing the New Legislation into force.

24. The effect of the New Legislation is to:

a) lower the threshold for what constitutes a "reportable transaction";

b) introduce reporting requirements for a new (but not yet fully defined) category of transactions known as "notifiable transactions";

c) require all advisors, including lawyers, to file an information return in respect of a reportable or notifiable transaction, regardless of whether a return was also filed by another person such as a client or other advisor;

d) shorten the deadlines for filing an information return;

e) increase the penalties for failing to comply with the obligation to disclose reportable transactions, and make a failure to disclose notifiable transactions subject to these same increased penalties; and

f) extend the limitation period for a tax reassessment if a required information return for a reportable or notifiable transaction is not filed.

25. In the paragraphs below, I provide further information on each of these aspects of the New Legislation.

Lowering Threshold for Reportable Transactions

26. As I set out above, section 237.3 of the Old Legislation defined a reportable transaction as an "avoidance transaction" (as defined by the GAAR) in which two of three "hallmarks" were present: a fee arrangement, confidentiality protection, or contractual protection.

27. Bill C-47 amended and expanded the definition of "reportable transaction" as follows:

a) First, a transaction is now an "avoidance transaction" for the purpose of the definition of "reportable transaction" if it "may reasonably be considered that one of the main purposes of the transaction, or of a series of transactions of which the transaction is a part, is to obtain a tax benefit" (emphasis added). This provides a lower threshold for a reportable transaction than an avoidance transaction as defined in the GAAR, which uses the "primary purpose" test.

b) Second, under the amendments, only one of the three "hallmarks" need to be present for the transaction to be reportable. This amendment is particularly significant given that the "contractual protection" hallmark can, read broadly, apply to many types of routine transactions.

28. As a result, the scope of potential "reportable transactions" is considerably broader under the New Legislation.

Introducing Reporting Requirements for "Notifiable Transactions"

29. Bill C-47 also created a new class of transactions which must be reported to CRA known as "notifiable transactions" (in addition to the reporting requirements with respect to "reportable transactions").

30. The New Legislation defines "notifiable transactions" broadly. A "notifiable transaction" is defined in section 237.4 of the New Legislation as:

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

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

31. Section 237.4(2) of the New Legislation further broadens the types of transactions captured by the definition of "notifiable transactions", stating that for the purposes of the definition of "notifiable transaction", the term "substantially similar":

a) includes any transaction, or series of transactions, in respect of which a person is expected to obtain the same or similar types of tax consequences (as defined in

subsection 245(1)) and that is either factually similar or based on the same or similar tax strategy; and

b) is to be interpreted broadly in favour of disclosure.

32. Section 237.4(3) permits the Minister, with the agreement of the Minister of Finance, to designate transactions or series of transactions for the purposes of section 237.4. The New Legislation does not contain any explicit limitations on the nature of transactions which can be designated by the Minister.

33. Section 237.4(4)(c) of the New Legislation requires every advisor in respect of a notifiable transaction to file an information return, regardless of whether the taxpayer or any other advisor has filed an information return.

34. The Minister has not yet designated any transactions as "notifiable transactions". It is therefore unclear as to what types of transactions will ultimately be deemed by the Minister to be "notifiable transactions".

35. In a guidance document published by the CRA regarding the new mandatory disclosure rules, the CRA stated that "[n]otifiable transactions will include both transactions that the CRA has found to be abusive, and transactions identified as transactions of interest (*i.e.*, where more information is required to determine if a transaction is abusive)." (emphasis added). A copy of the guidance document, dated as having last been modified on 2023-09-06, is attached to this Affidavit as **Exhibit "B"**.

36. In any event, it is my experience that the guidance documents published by the CRA are of little precedential value when litigating the meaning of the ITA. These guidance documents are only the CRA's interpretation of the legislation, are liable to change at any time, and do not have the force of law. The guidance document with respect to the New Legislation has already been amended multiple times (most recently on September 6, 2023).

Requiring Disclosure from Lawyers

37. Bill C-47 repealed the section of the Old Legislation (s. 237.3(4)) that stated that the filing of a return with respect to a reportable transaction by one person relieves others (including lawyers) of the obligation to also file returns. By repealing this deemed reporting provision in section 237.3(4) of the Old Legislation, the New Legislation places an independent

obligation on legal professionals (and other "advisors") to file information returns in respect of reportable transactions, which cannot be satisfied by their clients or other advisors submitting an information return to CRA.

Shortening Reporting Deadlines

38. Bill C-47 significantly shortened the deadlines for filing an information return with CRA with respect to a reportable transaction (and similarly, impose this shortened deadline for notifiable transactions).

39. Pursuant to section 237.3(5) of the Old Legislation, information returns with respect to "reportable transactions" had to be filed with CRA on or before June 30 of the calendar year following the calendar year in which the transaction became a "reportable transaction". Under sections 237.3(5) and 237.4(9) of the New Legislation, information returns for both reportable transactions and notifiable transactions must be filed with the CRA within 90 days of the earlier of:

a) the day that the taxpayer (or a person who entered into the transaction for the benefit of the taxpayer) becomes contractually obligated to enter into the reportable or notifiable transaction, and

b) the day on which the taxpayer (or a person who entered into the transaction for the benefit of the taxpayer) enters into the reportable or notifiable transaction.

Increasing Penalties for Failing to Report

40. Bill C-47 also significantly increased the penalties advisors, including legal professionals, face for failing to file an information return.

41. Under the Old Legislation, an advisor was only subject to a penalty of the amount of the professional fee they had charged in respect of the reportable transaction if they failed to report to the CRA. Now, under section 237.3(8)(b) of the New Legislation, in addition to these penalties, an advisor may also be fined $10,000 plus $1,000 per day while not in compliance, up to $100,000. The same penalties apply under section 237.4 (12)(b) of the New Legislation for failure to file an information return for a notifiable transaction.

42. In addition to these monetary penalties, the general offence provision in section 238 of the ITA continues to apply to the requirement to report reportable transactions and now also applies to the requirement to report notifiable transactions. Under this provision, any person who fails to file a return as required by the ITA is guilty of an offence and, in addition to the penalties provided for elsewhere in the ITA, is liable to a fine of up to $25,000 and imprisonment for a term of up to 12 months.

Extending Limitation Period for Reassessment

43. Finally, Bill C-47 extended the period during which the CRA may make a reassessment of tax for a taxation year if a required information return for a reportable or notifiable transaction is not filed.

44. Subsection 152(4) of the ITA permits reassessment after expiry of a normal reassessment period in certain circumstances. Bill C-47 added sections 152(4)(b.5) and 152(4)(b.6) to the New Legislation, which permit reassessment in respect of a reportable or notifiable transaction, after the normal reassessment period, where "an information return that is required..." is not filed as and when required. For a taxpayer who expects to receive a tax benefit from the transaction, reassessment is permitted until four years after the day on which "the information return is filed". For others, reassessment is permitted until three years after the day on which "the information return is filed".

45. As both sections 237.3 and 273.4 of the New Legislation may require reporting by multiple persons in respect of a notifiable transaction, with each being "an information return that is required ..." under section 152(4), CRA may take the position that the failure of any person (including a lawyer as advisor) to file an information return in respect of the transaction as and when required will have the effect of suspending the reassessment period for the taxpayer until three or four years, as the case may be, after the outstanding return has been filed.

What Must be Reported

46. CRA has published *RC312 - Reportable Transaction and Notifiable Transaction Information Return* (the "**Form**"), the form of information return that parties must file in respect of both reportable and notifiable transactions. A copy of the Form, marked as being last updated on 2023-07-24, is attached to this Affidavit as **Exhibit "C"**.

47. The Form requires the filing party to disclose, among other things, the following information regarding a reportable or notifiable transaction:

a) the identity of the person required to file the return (the "**Filing Party**");

b) the relationship of the Filing Party to the person obtaining the tax benefit;

c) if the Filing Party is an advisor, the amount of fees received or receivable by the advisor in respect of the transaction;

d) the identity of the person obtaining the tax benefit;

e) with respect to a notifiable transaction:

(i) the Filing Party's view as to whether the notifiable transaction is the same as a transaction (or series) designated by the Minister, or substantially similar to a transaction (or series) designated by the Minister;

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

(iii) the Filing Party's description of the reason they are disclosing the notifiable transaction regarding the designated transaction or series of transactions to which the notifiable transaction at issue is the same or substantially similar;

f) with respect to a reportable transaction:

(i) the Filing Party's description of the transaction;

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

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

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

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

(vi) the details of the transaction, which requires the Filing Party to provide the following information: "Identify and describe the reportable transaction or series of transactions in sufficient detail for the Minister to be able to understand the tax structure of all transactions. In addition, describe the expected, claimed, or purported tax treatment of all potential benefits expected to result from the transaction or series of transactions. Include any additional steps that are anticipated to occur. You may include any

> reference to any material used to determine the tax treatment of the transaction or series of transactions (technical interpretation, ruling, court decision, folio, interpretation bulletin, or other government document)".

Protections for Solicitor-Client Privilege in New Legislation

48. The rules in the New Legislation regarding reportable and notifiable transactions contain certain protections for solicitor-client privilege. Both section 237.3(17) (regarding reportable transactions) and section 237.4(18) (regarding notifiable transactions) state that information does not have to be disclosed to the CRA with respect to a reportable or notifiable transaction "if it is reasonable to believe that the information is subject to solicitor-client privilege."

49. However, statements published by the federal government indicate that the government still expects lawyers to disclose information regarding their clients to CRA under the reporting regime provided by the New Legislation despite this protection for privileged information. Specifically, in the explanatory notes to the proposed ITA amendments published in February 2022, the Minister of Finance stated that:

> For the purpose of new section 237.4 of the Act, a lawyer (including an advocate or notary in the province of Quebec) who is an advisor in respect of a notifiable transaction is not required to disclose in an information return in respect of the transaction, any information in respect of which the lawyer, on reasonable grounds, believes that a client of the lawyer has solicitor-client privilege. Such a person would nevertheless be expected to provide information for which solicitor-client privilege does not exist.

An excerpt from these notes is attached to this Affidavit as **Exhibit "D".**

50. To my knowledge, the federal government has not issued any other guidance regarding the distinction between what must be disclosed under the New Legislation and what information need not be disclosed due to solicitor-client privilege.

Deadline for Filing Information Returns under New Legislation is Imminent

51. The first possible deadline to submit an information return under the New Legislation is September 21, 2023.

52. The New Legislation applies to reportable and notifiable transactions entered after Bill C-47 received royal assent on June 22, 2023. As such, the amendments apply to transactions that a person entered into, or become contractually obligated to enter into, on June 23, 2023 or

later. Accounting for the 90-day reporting deadline to submit information returns under the New Legislation, the first possible deadline for submitting an information return under the reportable and notifiable transaction scheme in the New Legislation is therefore September 21, 2023.

E. Legal, Ethical and Practical Issues for Legal Professionals created by the New Legislation

53. It is not yet clear how exactly the New Legislation will apply to lawyers and other legal professionals. However, in this Affidavit I identify concerns I have with its application and the practical, legal and ethical issues it will create. For the reasons I set out below, the application of the New Legislation to legal professionals is a threat to the integrity of the relationship between lawyers and their clients, and the independence of the legal profession.

Qualitative Assessment of Requirement to File a Report

54. While the Minister has not yet designated any transactions as "notifiable transactions", it is clear from both the existing definition of "reportable transaction" and the information currently available with respect to "notifiable transactions" that an assessment of whether a particular transaction must be reported is one that will in many if not all cases require subjective analysis of statutory provisions and the application of legal judgment.

55. With respect to "reportable transactions", as discussed above, the New Legislation amends the definition of "avoidance transaction" (a requirement for a transaction to be a "reportable transaction") to apply where "it may reasonably be considered that one of the main purposes of the transaction, or of a series of transactions of which the transaction is a part, is to obtain a tax benefit". This definition contains at least four distinct components which require the application of legal judgment:

a) The use of the qualifier "may reasonably be considered" requires legal judgment. The legal professional must consider both their own view of the transaction, and also a hypothetical range of "reasonable" views regarding the transaction.

b) Determining whether a purpose is "one of the main purposes of the transaction" requires legal judgment, factual knowledge regarding the transaction, and tax law expertise.

c) Determining whether a transaction is a part of a "series of transactions" must be determined by evaluating connections and relationships between one transaction or event and others. Legal professionals may reasonably disagree as to whether sufficient connections exist for a transaction to be considered part of a series.

d) Whether a transaction provides a "tax benefit" requires the application of legal judgment and tax law expertise. The term "tax benefit" is defined for the purposes of section 237.3 by reference to the term's definition in section 245(1). The definition is complex, stating that a tax benefit means:

(i) a reduction, avoidance or deferral of tax or other amount payable under the Act, and includes a reduction, avoidance or deferral of tax or other amount that would be payable under the Act but for a tax treaty,

(ii) an increase in a refund of tax or other amount under this Act, and includes an increase in a refund of tax or other amount under the Act as a result of a tax treaty, or

(iii) a reduction, increase or preservation of an amount that could at a subsequent time

A. be relevant for the purpose of computing an amount referred to in paragraph (i) or (ii), and

B. result in any of the effects described in paragraph (i) or (ii).

56. The consequence of this definition is that there are at least four distinct issues that legal professionals may reasonably disagree on when determining whether a transaction is an "avoidance transaction" within the meaning of the New Legislation, and thereby whether a transaction may constitute a "reportable transaction".

57. With respect to notifiable transactions, assuming that the Minister designates "notifiable transactions" with sufficient precision and detail, determining whether a particular transaction or series is the same as a transaction or series that has been designated should be a straight-forward exercise of comparison.

58. However, the requirement under section 237.4 of the New Legislation to report a transaction that is "substantially similar" to a designated notifiable transaction will require qualitative legal assessment.

59. Section 237.4(2)(a) of the New Legislation expands the ordinary meaning of "substantially similar" to include any transaction or series "... in respect of which a person is expected to obtain the same or similar types of tax consequences (as defined in subsection 245(1)) and that is either factually similar or based on the same or similar tax strategy" [emphasis added]. The factual nature of the "substantially similar" inquiry, particularly when expanded by ambiguous and undefined concepts such as "type" of tax consequence and "tax strategy", will create interpretive uncertainty as to whether a particular transaction or series is "substantially similar" to a designated transaction and therefore subject to the reporting requirement for notifiable transactions. Further, the use of "includes" suggests that transactions may be substantially similar to designated transactions even if both elements listed in paragraph 237.4(2)(a) are not met.

60. The uncertain meaning of the phrase "substantially similar" is compounded by paragraph 237.4(2)(b), which states that the phrase is to be interpreted "broadly in favour of disclosure".

61. Legal professionals may reasonably disagree whether a particular transaction will obtain "similar types of tax consequences" or is based on a "similar tax strategy" and therefore be deemed "substantially similar" to a designated notifiable transaction. Each legal professional's view regarding the tax consequences or tax strategy of a transaction will necessarily be influenced by their experience with tax law, prior exposure to various tax strategies, and their level of knowledge regarding the purpose and structure of a given transaction. This will, in turn, create uncertainty as to a legal professional's obligation to report.

62. A similar issue is created by the requirement to report a transaction where it is part of "a series of transactions" that is the same as or substantially similar to transactions that have been designated as notifiable.

63. As discussed above, whether a transaction falls within a "series of transactions" will have to be determined by evaluating connections and relationships between one transaction or event and others. As with the case with the "substantially similar" requirement, legal professionals may reasonably disagree as to whether sufficient connections exist in a given

situation for a transaction to be considered part of a series, creating further uncertainty as to their duty to report.

Broad Definition of "Advisor"

64. The issues outlined above are compounded by the broad definition of "advisor" found in the New Legislation (which in turn engages the requirement to report). The New Legislation broadly defines who is an "advisor" for the purpose of filing a return with respect to both reportable and notifiable transactions. It includes any person who provides, directly or indirectly in any manner whatever, "any assistance or advice with respect to creating, developing, planning, organizing or implementing" a reportable or notifiable transaction.

65. Complex transactions often involve multiple legal professionals. This broad definition of "advisor" will likely capture a number of legal professionals who do not specialize in tax law. For example, an "advisor" could include: a general practitioner who incorporates a company to help implement the transaction; a lawyer or agent who registers a land transfer that is one of the transaction steps; a litigator who gives advice on commercial issues arising from a transaction; or a paralegal or articling student who drafts transaction implementation documents. While section 237.4(8) clarifies that a person who provides solely clerical services or secretarial services with respect to a notifiable transaction does not have to report, each of the legal professionals in the example above provide services which would not qualify for this exemption.

66. In my own practice, I am often retained to provide legal advice on a very specific tax issue within a larger transaction. Such transactions frequently already have multiple tax lawyers involved, and other lawyers planning and implementing the transaction (*e.g.* corporate, competition, finance, securities, real estate, pension, employment, and other lawyers with specialized expertise). I am only provided the facts necessary to address the specific tax issue I have been retained to consider. Once I have provided my advice on the issue, I may not be provided any further details regarding the transaction moving forward.

67. For example, I may provide advice with respect to a potential transaction prior to the transaction being entered into (which will trigger the reporting obligation under section 237.3(5) and 237.4(9)). I may not subsequently be informed whether the parties eventually entered into the transaction, either pursuant to the structure I advised on or a different one. My client would be under no obligation to provide me with updated information regarding the transaction and with which to assess my obligation to report to the CRA.

68. The broad definition of "advisor" means that any legal professional caught by this definition will be required to undertake the qualitative exercise of determining whether they are under an obligation to report a reportable or notifiable transaction, irrespective of whether they played a limited role in the transaction in question.

Conflict between Reporting Rules, and Ethical and Professional Obligations

69. The New Legislation will also create a conflict between a lawyer's ethical duties to their clients and the reporting requirements with respect to both reportable and notifiable transactions. In discussing this issue, I have referred to both the *Code of Professional Conduct for British Columbia* (the "**BC Code**") and the *Model Code of Professional Conduct* (the "**Model Code**") published by the Federation (which the Federation maintains in an effort to harmonize the ethical rules governing the conduct of lawyers across Canada). A copy of the BC Code is attached is attached to this Affidavit as **Exhibit "E"**. I understand that Jill Perry, the President of the Federation, is swearing an affidavit in this proceeding to which is attached the Model Code.

Duty of Confidentiality

70. A lawyer has a duty to keep information obtained from a client confidential, and not disclose it unless authorized by the client to do so or required by law. This duty of confidentiality extends to the fact that the lawyer was retained or consulted by a client about a matter (Rule 3.3-1 of BC Code and Model Code, and accompanying commentary).

71. A lawyer's ethical duty of confidentiality is wider than obligations that apply with respect to solicitor-client privilege. Paragraphs 1 and 2 of the commentary to Rule 3.3-1 in both the BC Code and Model Code read:

> [1] A lawyer cannot render effective professional service to a client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.
>
> [2] This rule [regarding confidential information] must be distinguished from the evidentiary rule of lawyer and client privilege, which is also a constitutionally protected right, concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

72. A lawyer also has a duty not to use or disclose a client's confidential information to the disadvantage of the client, or for the benefit of the lawyer, without the consent of the client (Rule 3.3-2 of BC Code and Model Code).

73. Under the New Legislation, legal professionals will be required to disclose confidential client information, which is only obtained by reason of having provided legal services to the client, in order to comply with the requirement to report reportable and notifiable transactions.

74. While it may be possible for counsel to obtain consent from a client prior to disclosing their confidential information to the CRA, there is no certainty they will be able to do so, particularly given the tight timelines for filing a return under the New Legislation. It may also be impossible for counsel to seek advance consent where the nature of the transaction is not yet known or where the scope of required disclosure is unclear.

75. There is no certainty that legal professionals, their clients, regulators and others will be able to confidently conclude that disclosure of confidential client information is "required by law" given the subjective assessment that will be necessary to determine whether a return needs to be filed in respect of any particular transaction.

76. Clients may also disagree with their counsel as to whether a particular transaction is reportable or notifiable, and whether disclosure is thereby "required by law". Clients may instruct their counsel to maintain confidentiality and not report the transaction, even if the lawyer believes they are required by law to report. The lawyer will then have to decide whether to:

a) report, breach the client's confidence and instructions, face civil suit by the client and potential disciplinary action by the law society, and decide whether to breach privilege in the course of mounting their defence to the same; or

b) refuse to report and face potential fines and imprisonment by the federal government.

77. When faced with this choice, legal professionals may weigh the risks and decide that it is in their best interest to disclose confidential client information whenever it is possible they are required to do so, even if unable to obtain client consent, in order to avoid significant fines and the possibility of imprisonment.

Conflict of Interest

78. A lawyer must not act for a client where there is a conflict of interest, except as permitted by the relevant code of conduct. A conflict of interest exists when there is a substantial risk that a lawyer's loyalty to a client would be materially adversely affected by the lawyer's own interests or duties to another person. Effective representation may be threatened where a lawyer is tempted to prefer the lawyer's own interests over those of their client (Rule 3.4-1 of BC Code and Model Code, and accompanying commentary).

79. The reportable and notifiable transactions rules in the New Legislation may place the lawyer's interests in conflict with the client's interests. The prospect of penalties being imposed on the lawyer creates a conflict of interest between the lawyer and client, as it will always be in the lawyer's interest to report a transaction, even if the requirement to report is questionable or if reporting is contrary to the client's interests.

80. A lawyer also has a duty to give an open and undisguised opinion of the merits of the client's cause and disclose what the lawyer honestly thinks about the merits and probable results (Rule 3.2-2 of BC Code and Model Code, Rule 2.1-3(a) of BC Code).

81. Under the New Legislation the lawyer's potential liability arising from their role as advisor in respect of a transaction that might be considered notifiable or reportable can be expected to affect the lawyer's ability to provide open, objective, honest advice to a client about filing obligations or the legal merits of proceeding with the transaction as structured, or at all. While structuring a transaction in a way that might be considered notifiable or reportable may be in the client's best interest, it may be in the lawyer's best interest to recommend an alternative transaction structure that could not be considered notifiable or reportable, to avoid the possibility of the lawyer having to report or face sanction.

Duty to Claim Privilege

82. A lawyer has an obligation to claim privilege when federal or provincial law requires the lawyer to produce information or a document that is or may be privileged, unless the client waives the privilege. Absent instructions from the client to the contrary, a lawyer is expected to assert privilege regardless of the lawyer's view as to whether the document or information is actually privileged (BC Code, Rule 3.3-2.1).

83. The New Legislation only permits information to be withheld on the basis of solicitor-client privilege where it is "reasonable to believe that the information is subject to solicitor-client privilege".

84. There is again real potential for conflict between a lawyer's ethical duties and the reporting regime established by the New Legislation. There is no mechanism in the New Legislation to resolve a disagreement regarding privilege as between a lawyer and their client or to offer protection to lawyers where it is unclear whether they are able to withhold information on the basis of solicitor-client privilege.

85. There is also no mechanism in the New Legislation for a lawyer to claim solicitor-client privilege over information if their client or another advisor or promoter has arguably waived privilege over that information in providing their own information return. This is entirely possible given the breadth of information required to be disclosed in the Form, as set out above. This will mean that lawyers will either have the burden of reviewing the information returns of their clients and any other advisors or promotors who have to file a return to ensure that privilege is maintained or be prepared to deal with an argument that they are required to disclose privileged information in their own information return (or subsequently) because the privilege over that information has been waived.

Other Practical Issues Arising from Reporting Rules

Potential Investigation of Legal Professionals by the CRA

86. Under the ITA, the CRA has broad powers to:

a) inspect, audit or examine any documents or records relevant to determining the obligations or entitlements of a person under the Act (s. 231.1(1)(a));

b) enter, without a warrant, any premises where a business is carried on or where books and records should be kept (s. 231.1(1)(c));

c) require a person to render all reasonable assistance including to compel a person to attend at a place of the CRA's choosing to answer questions orally or respond to questions in a form specified by the CRA (s. 231.1(d) and (e)); and

d) obtain and execute search warrants (s. 231.3).

87. Pursuant to sections 237.3(13) and 237.4(17), the CRA may exercise any and all of these powers in seeking to verify or ascertain any information in respect of a reportable or notifiable transaction.

88. Lawyers' files may be open to inspection, or lawyers subject to interrogation, by the CRA in relation to potentially reportable or notifiable transactions. This would allow the CRA to subject legal professionals to time-consuming, costly and intrusive audit procedures. Exercise of the CRA's investigative, audit, and seizure powers as against lawyers will also increase the risk that privileged information may be disclosed to the CRA.

Assessments of Taxpayers and Legal Professionals

89. It is a longstanding principle of Canadian tax law that the CRA has the power to assume facts which underly an assessment. A person subject to an assessment bears the burden of disproving the facts assumed by the CRA on a balance of probabilities. I am not aware of any reason to expect that the power to make assumptions would apply differently in the case of the reportable or notifiable transaction rules. For example, the CRA could make assumptions of fact that paint similarities between a designated transaction and a transaction with respect to which a lawyer has provided advice or assistance, so as to support a position that reporting was required.

90. Pursuant to s. 152(8) of the ITA, once an assessment is made, including an assessment of penalties, the assessment is deemed valid and binding until varied or vacated on appeal. Lawyers will face the prospect of having to challenge a penalty assessment under the reportable or notifiable transaction rules with the burden of disproving facts assumed by the CRA or otherwise demonstrating that the assessment is not correct. Further, the best evidence the lawyer may have in attempting to challenge the assessment may be the very confidential or privileged client information that the lawyer remains bound to protect by the ethical rules.

Accessibility of Legal Services

91. The New Legislation may cause legal professionals to decide not to provide legal services on a matter that could be considered a reportable or notifiable transaction. It follows that clients seeking legal advice on transactions may find it difficult to obtain legal services, even in situations where there is merely some aspect of their transaction that has similarity to a reportable or notifiable transaction. It is worth recalling that transactions to be designated as notifiable are not illegal or tax evasion. They are also not transactions which a court has concluded to be abusive and to which the GAAR should apply. They are transactions that the CRA considers to

be abusive or to which the CRA would like more information to determine whether they are abusive.

92. To provide an example from my own practice, I am often retained to provide advice to small accounting firms, law firms, sole practitioners, and similar clients on relatively small transactions. If the New Legislation is applied against legal professionals, I will likely cease providing such services. Given the potential liability for a failure to report, the level of diligence and follow-up required to assess whether there is a duty to report, and the relatively small fees I charge for such matters, it would not be economically viable for me to continue accepting these types of retainers.

Significant Burden of Financial Penalty

93. The financial penalties imposed under the New Legislation will expose legal professionals, including articling students, to significant personal liability. The Lawyers Indemnity Fund does not provide coverage for fines or penalties. Legal professionals will be required to self-fund penalty payments and may be exposed to severe financial consequences for failing to file an information return that they did not know they needed to file. The severity of these financial consequences is particularly acute for smaller firms and sole practitioners, who often assist with discrete tasks in a large transaction and may not have access to all relevant facts regarding the broader transaction or the specialized tax expertise required to determine whether they are required to file a return.

94. While legal professionals will bear the cost of defending themselves from financial penalties privately, the CRA has significant resources and institutional power to engage in constant assessment of transactions and litigation regarding disputes with taxpayers and advisors such as legal professionals. In my experience, the CRA will sometimes litigate issues to establish precedent to apply in future cases, even where such litigation may create significant hardship for taxpayers or advisors.

Inability to Defend Against Penalties and Offences

95. The New Legislation provides for a limited due diligence defence in each of s. 237.3(11) (with respect to reportable transactions) and s. 237.4(6) (with respect to notifiable transactions). There are a number of issues that will legally and practically make it difficult (if not

impossible) for legal professionals to avail themselves of these statutory defences or a common law due diligence defence:

a) With respect to notifiable transactions, it does not appear that the due diligence defence found in s. 237.4(6) is available to any advisors or promoters.

b) With respect to reportable transactions, it not clear that the due diligence defence found in s. 237.3(11) will apply to the general offence provision found in section 238 (which, as set out above, states that any person who fails to file a return as required by the ITA is guilty of an offence and, in addition to the penalties provided for elsewhere in the ITA, is liable to a fine of up to $25,000 and imprisonment for a term of up to 12 months), meaning lawyers may still be charged under that section for failing to make a return.

c) To the extent any due diligence defence is available (whether statutory or at common law), the natural source of information for the lawyer to mount their defence is the client file, including lawyer-client correspondence in which the lawyer seeks information from the client regarding the nature of the transaction or any other information that could be relevant in determining whether the transaction is reportable or notifiable. Such correspondence would normally be subject to solicitor-client privilege, and the lawyer would be prohibited from disclosing it without client consent. While the client may waive the privilege, they are not obligated to do so, and might reasonably determine that waiving privilege is not in their interest. Further, given the lawyer's own interest in the client's decision to waive privilege, the lawyer would be ethically obligated to recommend the client obtain independent legal advice regarding any decision to waive privilege.

d) A mistake of law is not included in the ambit of the common law due diligence and a mistaken interpretation of the notifiable transaction legislation (even if reasonably held) or a legal conclusion that is later determined to be incorrect will therefore likely not be saved by a due diligence defence. This is particularly problematic given the ambiguity of the disclosure requirements under the New Legislation.

e) The administrative and financial burden for lawyers who find themselves facing a penalty or an offence will be significant, and the work required to defend themselves will be their own financial burden. This is not to mention the stress and

practice disruption that it would cause a lawyer to have to defend themselves against the CRA for failure to file an information report due to work done on behalf of their clients.

F. Conclusion

96. My most pressing concern with the New Legislation is the direct conflict it will create between a lawyer's own interest in avoiding significant fines and potential imprisonment and their professional obligations requiring them to avoid exposing their clients to the same.

97. The mandatory disclosure scheme and a lawyers' duties to their clients are squarely in conflict. These rules ultimately require legal professionals to deliver their client's confidential (and perhaps privileged) information to the federal government. This information may then be used against the client to their detriment. Lawyers are required to report this information based on ambiguously drafted legislation, on a short timeline, with no mechanisms in the legislation to protect them or their clients should they disagree on the requirement to report, and with significant penalties for both them and their clients should the lawyer ultimately be incorrect in their decision.

98. Irrespective of how individual legal professionals approach the New Legislation, whether it be accepting the possibility of significant fines or imprisonment, choosing to risk their client's interests to avoid the same, or avoiding engagement with potentially reportable or notifiable transactions altogether, I expect the application of the New Legislation to legal professionals will result in decreased accessibility to legal services, independence of the bar, and public confidence in the legal profession.

SWORN by Michael Colborne in the City of Toronto, in the Province of Ontario 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.

Sahil Kesar

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

Sahil Kesar, LSO# 83583C

Michael Colborne