



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN

November 15, 2010

Via email: jflaherty@fin.gc.ca

The Honourable James M. Flaherty, P.C., M.P.
Minister of Finance
Finance Canada
140 O'Connor Street
Ottawa, Ontario K1A 0G5

Dear Minister,

Re: August 27, 2010 Draft Legislation – Information Reporting of Tax Avoidance Transactions

On behalf of the Canadian Bar Association, I would like to thank you for meeting with us on November 1, 2010 and giving us the opportunity to discuss the potential impact of the proposed information reporting measures on solicitor-client privilege.

We appreciate your concerns about the promotion and marketing of abusive tax avoidance arrangements. Based upon our discussion, we understand that the intent of the information reporting measures is not to require the disclosure of privileged information. We encourage you to express this intent in the legislative measures and explanatory notes.

In particular, the CBA is concerned with the impact of the proposed reporting obligation where it extends to a lawyer engaged in a solicitor-client relationship. The CBA believes that a statutory provision is required to make clear that a lawyer will be relieved of the obligation to file an information return where the lawyer believes, on reasonable grounds, that the client has a solicitor-client privilege on any information otherwise required to be disclosed. Our proposed language for this provision is attached.

We expect that the prescribed information required in the information return will be fairly extensive. Accordingly, we suggest that the explanatory notes to proposed section 237.3 expressly state that the intent of the reporting obligation is not to require a taxpayer to disclose any information in respect of which the taxpayer has a solicitor-client privilege.

The Supreme Court of Canada has recognized that solicitor-client privilege must be as close to absolute as possible to ensure public confidence in the administration of justice. We

believe that our suggested changes will prevent infringement of solicitor-client privilege, without undermining the proposed reporting regime's effectiveness. The need to protect solicitor-client privilege outweighs any impact the exclusion of lawyers in the manner suggested may have on the proposed information reporting regime.

I thank you for considering the CBA's concerns and proposals and remain,

Yours very truly,

(original signed by Tamra L. Thomson for Elaine Marchand)

Elaine Marchand
Chair, National Taxation Law Section

cc: Tim Wach
Finance Canada Tim.Wach@fin.gc.ca

PROPOSED AMENDMENTS TO SECTION 237.3

Amendment to subsection 237.3(1): [The following definitions apply in this section.]

“lawyer” has the meaning assigned by subsection 232(1).

“solicitor-client privilege” means the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is in respect of a communication passing between a person and the person's lawyer in professional confidence.

Addition of subsection 237.3(17):

For greater certainty, a lawyer who would be required, but for this subsection, to file an information return in respect of a reportable transaction under subsection (2), shall not be required to file an information return in respect of such reportable transaction if the lawyer, on reasonable grounds, believes that a client of the lawyer has a solicitor client privilege in respect of any prescribed information that would be required, but for this subsection, to be included in such information return.