January 26, 2023

VIA EMAIL

The Honourable Chrystia Freeland, P.C., M.P.
Deputy Prime Minister and Minister of Finance
Department of Finance Canada
90 Elgin Street
Ottawa, Ontario K1A 0G5

Dear Minister:

RE: Bill C-32, *Fall Economic Statement Implementation Act, 2022*

Established in 1963, The Advocates' Society is a not-for-profit organization representing approximately 5,500 diverse lawyers and students across the country—unified in their calling as advocates. As the leading national association of litigation counsel in Canada, The Advocates' Society and its members are dedicated to promoting a fair and accessible system of justice, excellence in advocacy, and a strong, independent, and courageous bar. A core part of our mission is to provide policymakers with the views of legal advocates on matters that affect access to justice, the administration of justice, the independence of the bar and the judiciary, the practice of law by advocates, and equity, diversity, and inclusion in the justice system and legal profession.

The Advocates' Society writes to add its voice to the views already expressed by the Federation of Law Societies of Canada and the Canadian Bar Association concerning amendments to the *Income Tax Act* (Canada) (the "**Act**") set out in Bill C-32 and to register its disappointment that Bill C-32 passed on December 15, 2022, without incorporating any changes that would accommodate those concerns. The amendments impose T3 Trust Income Tax and Information Return ("**T3**") filing requirements upon lawyers and notaries for specific client trust accounts that they maintain.[1] The T3 filings would include, *inter alia*, client names, addresses and financial information.

The Advocates' Society had the benefit of reviewing the cogent submissions on the implications of Bill C-32 by the Federation of Law Societies of Canada and the Canadian Bar Association, commend their analyses, and agree with their concerns. The Advocates' Society's views are as follows.

Relationship Between Lawyers and Their Clients Will Be Impacted by the Amendment

The Supreme Court of Canada has held that

> It is indisputable that solicitor-client privilege is fundamental to the proper functioning of our legal system and a cornerstone of access to justice. Lawyers have the unique role of providing advice to clients within a

[1] Clause 35 of Bill C-32, now s. 150(1.2)(c) of the Act, which is deemed to apply to taxation years ending after December 30, 2023.

> complex legal system. Without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive. It is therefore in the public interest to protect solicitor-client privilege. For this reason, "privilege is jealously guarded and should only be set aside in the most unusual circumstances".[2]

The nature and critical importance of solicitor-client privilege has been thoroughly discussed in the Federation of Law Societies of Canada and the Canadian Bar Association's submissions regarding Bill C-32.

The relevant amendments to the Act seek to protect from disclosure any information that is subject to solicitor-client privilege.[3] However, the extent to which client names, addresses and financial information are protected may vary depending on the circumstances. Lawyers, notaries and their clients may perceive significant uncertainty. Clients will likely err on the side of non-disclosure if there is any modicum of uncertainty. Privilege belongs to the client and only may be waived by the client and any mistake may be highly prejudicial to the client. Competent lawyers and notaries will be required to discuss with their clients, from the outset of an engagement, the trust reporting requirements and confirm client instructions. The tension, highlighted in other stakeholders' submissions regarding Bill C-32, is that failing to file tax and information returns, as and when required, may attract civil penalties for the lawyer or notary (at best) and criminal consequences for the lawyer or notary (at worst). Thus, the amendments to the Act place lawyers and notaries in a conflict of interest with their clients, and undermine other duties, including duties of loyalty and confidentiality to clients. This is, respectfully, an untenable situation completely at odds with the special role of lawyers and notaries in society and the myriad obligations under which lawyers and notaries operate.

Moreover, the amendments would materially compromise the lawyer's duty of commitment to their clients. The Supreme Court of Canada has struck down similar legislation that had the same effect on the duties a lawyer owes to their client:

> I also conclude that a reasonable and informed person, thinking the matter through, would perceive that these provisions in combination significantly undermine the capacity of lawyers to provide committed representation. The reasonable and well-informed client would see his or her lawyer being required by the state to collect and retain information that, in the view of the legal profession, is not required for effective and ethical representation and with respect to which there are inadequate protections for solicitor-client privilege. Clients would thus reasonably perceive that lawyers were, at least in part, acting on behalf of the state in collecting and retaining this information in circumstances in which privileged information might well be disclosed to the state without the client's consent. This would reduce confidence to an unacceptable degree in the lawyer's ability to provide committed representation.[4]

Accordingly, the amendments may be subject to legal challenge on a similar basis.

Amendments Lack Proportionality and Necessity

As set out in other submissions, lawyers and notaries are already heavily regulated in respect of client trust accounts. It would do a disservice to the profession and to regulators for the Government of Canada to assert that client trust accounts would be a vehicle for tax avoidance or evasion and, to the extent that

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[2] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, at para. 34 (references omitted).

[3] Clause 35 of Bill C-32, now s. 150(1.4) of the Act.

[4] *Canada (Attorney-General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401**,** at para. 109.

there is any concern about fiscal malfeasance, that concern is not the domain of the CRA but rather the lawyer regulators who are well-positioned to investigate and take action. As further noted elsewhere, to the extent that income is earned on funds held in trust, such income is subject to T5 reporting. Moreover, the CRA is already seized of significant audit and investigation powers, and in each budget cycle is granted increasingly greater resources to administer and enforce the Act. In light of existing reporting requirements and the CRA's already significant powers and resources, we query what the CRA would gain by forcing lawyers and notaries to report that they hold funds in trust for clients. If there is a tax determination purpose to be achieved through the proposed legislation, we are unsure what that might be, other than to ferret out situations in which trust accounts are being used as a vehicle to secret funds or obscure their ownership and, if that is the case, we unequivocally disagree with the basis of any such presupposition.

Whatever minor advantage, if any, that accrues to the CRA in the circumstances would be at the expense of undermining the fundamental values of solicitor-client privilege and the independence of the bar. Further, while administrative burden and cost are of lesser importance than sacrosanct principles such as solicitor-client privilege and the duties lawyers owe their clients, they are not unimportant. Some firms project being required to annually file hundreds, if not thousands, of T3 returns in connection with the amendments. The cost of compliance would be significant and, again, the value of the information to the CRA is unclear since income earned on invested trust funds is in any case reportable on T5 information returns. It is disproportionate to any tax administration objective and essentially unnecessary to require lawyers and notaries to further report in respect of funds in trust held on behalf of their clients.

Recommendation

The Advocates' Society recommends that the government consult with affected stakeholders on the anticipated effects of the amendment to the Act incorporated in s. 150(1.2)(c) as soon as possible, and in any case before lawyers are required to prepare and file T3 returns for 2023.

Should, as we anticipate:

i. The change not be expected to provide the CRA with information that is helpful in detecting compliance gaps, aggressive tax planning, tax evasion or fiscal crime, or

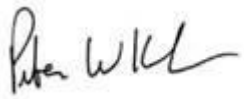
ii. The change's negative impacts on access to justice and lawyer practice be expected to outweigh its beneficial effects for tax collection,

The Advocates' Society recommends that s. 150(1.2)(c) be further amended as follows:

> **(c)** is required under the relevant rules of professional conduct or the laws of Canada or a province to hold funds for the purposes of the activity that is regulated under those rules or laws~~, provided the trust is not maintained as a separate trust for a particular client or clients~~;

We would be pleased to answer any questions you may have.

Yours sincerely,



Peter W. Kryworuk
President

CC: The Honourable David Lametti, P.C., M.P., Minister of Justice and Attorney General of Canada
Steeves Bujold, President, Canadian Bar Association
Jill Perry, K.C., President, Federation of Law Societies of Canada
Vicki White, Chief Executive Officer, The Advocates' Society