



The Law Society of  
Upper Canada | Barreau  
du Haut-Canada

February 11, 2005

Sue Daly  
ABA Section of Business Law  
321 North Clark Street  
Chicago, IL 60610

Dear Ms. Daly:

**Re: ABA Task Force on Attorney-Client Privilege**

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## **Introduction**

The Law Society of Upper Canada (“the Law Society”) is pleased to provide this submission to the American Bar Association’s Task Force on Attorney-Client Privilege in response to its request for comments.

This submission focuses on developments in Canada, some in response to international events, which have raised concerns about encroachments on attorney-client privilege (commonly called solicitor-client privilege in Canada). The examples provided in this submission relate primarily to broad legislative or regulatory initiatives. One of these has become the subject of a constitutional challenge on the basis that it interferes with the independence of the legal profession, one of the hallmarks of which is protecting the client’s privilege.

The Law Society acknowledges that the Task Force is focusing on privilege in the context of corporate or organizational attorney-client relationships. While this submission will not address the Task Force’s specific questions arising from this focus, the hope is that a Canadian perspective on how legislative interests may effectively override the privilege will help to inform the deliberations of the Task Force.

## **Background on the Law Society of Upper Canada**

The Law Society is the largest of all Canadian law societies and is the governing body of the 36,000 members of the legal profession in the province of Ontario. It was founded on July 17, 1797, incorporated in 1822, and since its inception has been headquartered in Toronto. The *Law Society Act*<sup>1</sup>, the Ontario statute promulgated under the auspices of the Attorney General of Ontario, provides the legislative jurisdiction for the Law Society's independent regulation of the legal profession.

In 1994, the Law Society affirmed its role by adopting the following Role Statement:

The Law Society of Upper Canada exists to govern the legal profession in the public interest by

- ensuring that the people of Ontario are served by lawyers who meet high standards of learning, competence and professional conduct, and
- upholding the independence, integrity and honour of the legal profession,

for the purpose of advancing the cause of justice and the rule of law.

The Law Society's affairs are conducted by 48 governors called benchers, 40 of whom are elected by members of the legal profession every four years and eight of whom are members of the lay public appointed by the Ontario government. Benchers meet monthly to formulate policy on matters related to the governance of the legal profession and deal with other Law Society business in a forum called Convocation. Additional responsibilities include sitting on hearing panels to hear conduct, capacity and competence cases and participation on various Law Society committees. The head of the Law Society is the Treasurer, who presides over Convocation.

The Law Society is responsible for

- the admission of lawyers to the practice of law in the Province of Ontario,
- maintaining standards of competence within the profession,
- setting standards of professional conduct for Ontario lawyers, through its *Rules of Professional Conduct* and regulatory By-Laws made under the *Law Society Act*, and
- enforcing competence and conduct standards through its tribunals hearing function.

## **The Importance of Attorney-Client Privilege in the Justice System**

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<sup>1</sup> R.S.O. 1990 c. L.8.

Recent developments have intensified the Canadian legal profession's ongoing efforts to guard against encroachments on attorney-client privilege. Money-laundering and anti-terrorism legislation and new regulations by agencies such as the Securities and Exchange Commission, while addressing legitimate public protection issues, have impacted the legal profession globally.

Where the opportunity has permitted, the Law Society has publicly expressed its views on possible incursions on or dilution of the privilege that these developments present. The Law Society has consistently approached these efforts as a matter of public interest, which underlies its regulatory responsibilities, in recognition of the crucial nature of privilege in the client's relationship with the lawyer, which is based on the client's need to access legal advice in complete confidence. It is the universality of the principle underlying privilege that makes challenges to it a concern for lawyers in all jurisdictions where it is observed. As the Law Society stated in its report on multi-discipline partnerships (MDPs) in 1998:

The law of privilege ... is based upon respect for the oath and the honour of the lawyer who is duty-bound to guard the client's secrets, whether these secrets are communicated as part of the process of securing legal advice or in the course of consultations between the solicitor, the client and their agents in the context of litigation. ... It is for this reason that the solicitor-client privilege lies at the very heart of the common law system. Thus preservation and nurturing of the privilege is fundamental to the due administration of justice in our society.<sup>2</sup>

#### Independence of the Legal Profession, The Right to Counsel and Privilege

An independent legal profession is integral to our justice system. The Supreme Court of Canada confirmed this view in *Canada (Attorney General) v. Law Society of British Columbia*:

The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. ... The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members legal advice and services generally.<sup>3</sup>

The right to counsel is directly linked to the independence of the lawyer from the state. It has been observed that privilege is key to that right:

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<sup>2</sup> Law Society of Upper Canada, The "Futures" Task Force – Final Report of the Working Group on Multi-Discipline Partnerships, Report to Convocation, September 25, 1998 at page 31.

<sup>3</sup> [1982] 2 S.C.R. 307 at page 336.

Intrinsic to the right to counsel is the confidentiality in which the communications are made. Thus confidentiality is essential to the operation of the legal system. ...When a client approaches a solicitor to seek legal advice, it is vital to our system of justice that the client be free to seek such advice unhampered by fear of exposure or embarrassment. Because it is in the interests of the communication that the legal system function effectively, the injury done to the system by abandoning privilege is far greater than any benefit derived from the disclosure of potentially (but not always) relevant communications.<sup>4</sup>

The legal profession in Canada asserts that the right to independent counsel, including counsel's role as the guardian of solicitor-client privilege, is a constitutionally protected right under the *Canadian Charter of Rights and Freedoms*. Recently, Canadian law societies challenged sections of Canadian money laundering legislation, discussed in more detail later in this submission. In addressing an application for an interim injunction, the courts acknowledged that the independence of the bar as a constitutionally protected right in Canada is a serious constitutional question. The Superior Court of Ontario commented as follows:

In imposing a duty on legal practitioners to give secret reports of their clients' transactions to a government agency, the legislation clearly impinges on, and alters, the traditional relationship between solicitors, or counsel, and their clients. It does not merely override a lawyer's ethical duty of confidentiality – something that has always been possible – it strikes at the lawyer's duty of loyalty and the client's privilege against self-incrimination as well as the principle that lawyers should be independent of government. ... The existence and importance of these duties and principles have been affirmed in many cases.... The extent to which they give rise to constitutionally-protected rights as necessary components of the federal democratic political structure of this country, or as underlying, and implied in, the rights guaranteed by sections 7, 8 and 10(b) of the *Charter*, must, I consider, be characterized as serious constitutional issues raised by the legislation.<sup>5</sup>

The Supreme Court of Canada has acknowledged solicitor-client privilege as a constitutionally protected right<sup>6</sup>, and has related the privilege to other constitutional

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<sup>4</sup> Manes and Silver, *Solicitor and Client Privilege in Canada* (Butterworths: 1993, p.10).

<sup>5</sup> *Federation of Law Societies of Canada v. Attorney General of Canada*, (2002) 57 O. R. (3d) 383 at 400.

<sup>6</sup> In *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, (2002-09-12) SCC, <<http://www.canlii.org/ca/cas/scc/2002/2002scc61.html>>, the Supreme Court of Canada in assessing the constitutionality of search warrant provisions in s. 488.1 of the *Criminal Code* said, "Privilege does not come into being by an assertion of a privilege claim; it exists independently. By the operation of s.

and procedural protections. The cases in question involved searches of lawyers' offices, the second of which dealt with the question of whether privilege attached to documents related to a lawyer's fees and disbursements in circumstances in which the lawyer's client was alleged to have engaged in money laundering. In answering the question in the affirmative, the Supreme Court affirmed the importance and integral relationship of privilege to the justice system:

...Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum, which the Court forcefully stated even more recently in *McClure, supra* (at p. 450).<sup>7</sup>

The underlying purpose and basis for attorney-client privilege is well established as a fundamental component of the justice system, the individual's right to counsel and the independence of the bar. It ensures that the client will seek legal advice knowing that he or she can disclose in confidence all relevant information to the lawyer and that the lawyer is, as a result, able to provide in confidence the appropriate legal advice. In the words of the Supreme Court of Canada:

...The law is complex. Lawyers have a unique role. Free and candid communication between the lawyer and client protects the legal rights of the citizen. It is essential for the lawyer to know all of the facts of the client's position. The existence of a fundamental right to privilege between the two encourages disclosure within the confines of the relationship. The danger in eroding solicitor-client privilege is the potential to stifle communication between the lawyer and client. The need to protect the privilege determines its immunity to attack.<sup>8</sup>

## The Examples

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488.1, however, this constitutionally protected right can be violated by the mere failure of counsel to act, without instruction from or indeed communication with the client.”

<sup>7</sup> *Maranda v. Richler*, 2003 SCC 67 at ¶33. <<http://www.canlii.org/ca/cas/scc/2003/2003scc67.html>>

<sup>8</sup> *R. v. McClure*, [2001] 1 S.C.R. 445 at 459. <<http://www.canlii.org/ca/cas/scc/2001/2001scc14.html>>

## 1. *Anti-terrorism Act*

In December 2001, the Canadian Parliament enacted the *Anti-terrorism Act*. This Act was the first of three new acts in the Canadian Government's response to the events of September 11, 2001. The second was *An Act to amend the Aeronautics Act* (December 2001) to give speedier passage to provisions on regulations around passenger information, contained in the first iteration of the third act, the *Public Safety Act, 2002*. This act, discussed later in this submission, became law in May 2004.

While the Law Society supports the general objectives of anti-terrorism legislation, at Legislative Committee hearings held prior to the *Anti-terrorism Act's* enactment, the Law Society, through the Federation of Law Societies of Canada<sup>9</sup>, expressed concerns about a number of aspects of the legislation. One aspect was encroachments on attorney-client privilege.

Among the provisions in the Act are the following:

1. The Act amended Canada's *Criminal Code* to effectively require the disclosure of confidential attorney-client information to state authorities. It requires everyone to disclose to the Royal Canadian Mounted Police (RCMP) and the Canadian Security Intelligence Service (CSIS) the existence of property in their possession or control they know is owned or controlled by or on behalf of a terrorist group and information about a transaction or proposed transaction in respect of such property. For example, lawyers who hold funds in their trust accounts on behalf of individuals or organizations subject to the provisions of the Act in effect will become witnesses against their clients and be required to immediately disclose the existence of the trust funds to the RCMP and CSIS. Failure to do so will subject lawyers to fines of up to \$100,000 or up to ten years in prison.

The Federation of Law Societies of Canada recommended that information subject to attorney-client confidentiality and privilege be specifically excluded from the ambit of this section. No changes to the legislation were made to accommodate this recommendation.

The *Maranda* decision of the Supreme Court of Canada, noted earlier, relates to these provisions. In its decision, the Court established limits on information that may be obtained from lawyers through a warrant and search, as follows:

- There is a duty to minimize the amount of information sought, especially where it relates to privileged information. If the

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<sup>9</sup> The Federation of Law Societies of Canada is the umbrella organization of the fourteen Law Societies in Canada. Each law society governs the legal profession within their respective province or territory.

information can be obtained another way, the lawyer cannot be compelled to provide it.

- The amount of fees and disbursements related to a client are presumed to be privileged.
- The crime exception to privilege does not apply simply because the lawyer is paid with money which is allegedly the proceeds of crime when there is no allegation of the lawyer's involvement in the crime.

2. The Act permits the search of a lawyer's office pursuant to a warrant. The Federation had no issue with lawful searches of lawyers' offices, but said that safeguards must be in place to protect attorney-client communications. The Act is silent on the process for determining a claim of attorney-client privilege, and the Federation was concerned that material seized from a law office during a search may not be sufficiently protected from disclosure to the state pending a judicial determination of the issue of privilege. The *Criminal Code* procedures on how to determine the issue of privilege upon a search were struck down by the Supreme Court of Canada as unconstitutional.<sup>10</sup>

Because of the absence in these provisions of any mention of the privileged nature of the information that may be seized in a lawyer's office, the Federation recommended that a constitutionally valid legislative scheme that protects the highly confidential material kept in lawyers' offices be incorporated into the Act, and that all attorney-client communications be protected from disclosure during an investigative hearing<sup>11</sup>. No changes were made to accommodate this recommendation.

3. The Act amended the *National Defence Act* to allow the Minister of National Defence to authorize the interception of private communications between a foreign person and a Canadian. No judicial authorization is required; this power is vested solely in the Minister. This power could be used to intercept, or could result in the interception of, confidential attorney-client communications.

The Federation of Law Societies of Canada recommended that no private communication of any Canadian be intercepted other than pursuant to the authorization of a judge of a superior court. No changes were made to accommodate this recommendation.

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<sup>10</sup> *Supra* note 6.

<sup>11</sup> Under the *Criminal Code*, as a result of amendments pursuant to the *Anti-terrorism Act*, an investigative hearing is held upon the *ex parte* application of a peace officer, in connection with an investigation of a terrorism offence, for an order for the gathering of information.

## 2. *Public Safety Act, 2002*

In May 2004, the *Public Safety Act, 2002*, noted above as one of the new acts dealing with anti-terrorism, became law.

The Act incorporates the *Biological and Toxin Weapons Convention Implementation Act* which implements the Biological and Toxin Weapons Convention.<sup>12</sup> The Act deals with the powers of entry and inspection granted to inspectors. In particular, inspections may be carried out without a warrant, except in the case of a “dwelling house”. In accordance with these inspections, an inspector may

- inspect any information relevant to the administration of the Act,
- utilize any computer system,
- make copies of any record on the premises, and
- remove any relevant information.

The Act provides that the powers relating to search and seizure must follow the provisions with respect to search warrants set out in Canada’s *Criminal Code* (which as noted above, were struck down as unconstitutional) and that assistance be provided to inspectors in the course of their duties. Under the Act, the Minister<sup>13</sup> may require any person whom the Minister believes on reasonable grounds has information or documents relevant to the enforcement of the Act to provide the information or documents to the Minister. Penalties of imprisonment up to two years and/or a fine of up to \$50,000 may be imposed for failing to assist an inspector and failing to comply with a notice for providing documents.

The authority given to inspectors and the search and seizure powers raised concerns about the protection of attorney-client confidentiality and privilege. The Act does not provide for any exceptions to the production of documents based on privilege. While the Act provides that anyone receiving information

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<sup>12</sup> A legislative summary prepared by Canada’s Library of Parliament explains that this Convention prohibits the development, production and stockpiling of bacteriological (biological) and toxin weapons for any purpose other than prophylactic, protective or other peaceful purposes and thus supplements the prohibition on use of biological weapons contained in the 1925 Geneva Protocol. The Convention prohibits not only biological and toxin agents, but the munitions and equipment used to deliver them as well. The Convention was the first multilateral disarmament treaty to ban the use and production of an entire class of weapons. However, it is limited in its effectiveness because it lacks a formal verification regime, without which it is impossible to verify compliance. The Convention entered into force on March 26, 1975. Canada was one of the original signatories to the Convention, signing it on April 10, 1972 and ratifying it on September 18, 1972. To date, 163 parties have signed the Convention; of these, 144 have ratified it, including the United States.

<sup>13</sup> For the purposes of this Act, “Minister” means the member of the Queen’s Privy Council for Canada that the Governor in Council designates as the Minister for the purposes of the Act.

or documents under the Act from a person who consistently treated them in a confidential manner must maintain their confidentiality unless the person otherwise provides written consent, the exceptions to this provision (enforcement purposes under the Act or any other Act of Parliament, Canada's obligations under the Convention, or disclosure in the interest of public safety) are extremely broad and fail to recognize the privilege.

In its submission before a Parliamentary Committee on the legislation in February 2003, the Law Society recommended that there should be a specific exception recognizing the confidentiality of information and documents protected by attorney-client privilege. This provision would acknowledge that all information protected by the privilege is out of reach for the state, a right endorsed in September 2002 by the Supreme Court of Canada.<sup>14</sup> No changes to the legislation were made in response to this recommendation.

### **3. *Proceeds of Crime (Money Laundering) and Terrorist Financing Act***

The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 enables authorities to detect and deter money laundering, enhance law enforcement, and assist in fulfilling Canada's international commitment to participate in the fight against money laundering. The Act established the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) to collect information about money laundering and share it with domestic and international law enforcement agencies. In support of this effort, a wide range of persons and entities are required to record and report to FINTRAC information relating to "suspicious transactions" and "large cash transactions".

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<sup>14</sup> In *Lavallee*, *supra* note 6, in striking down the provisions of the *Criminal Code* that dealt with search and seizure in a lawyer's office, the Court at page 23 said:

Minimal impairment has long been the standard by which this Court has measured the reasonableness of state encroachments on solicitor-client privilege. Recently, in *Brown*, *supra*, in defining the scope of the "innocence at stake" exception to solicitor-client privilege, this Court insisted that the judge order the "production of only those communications that are necessary to allow an accused, whose innocence is otherwise at stake, to raise a reasonable doubt as to his guilt" (para. 77). In *Jones*, *supra*, this Court held at para. 77 that even where public safety is at stake, there must be a clear and imminent risk of serious bodily harm or death to an identifiable person or group before solicitor-client privilege can be compromised. Moreover, where it is determined that these criteria are met, the majority in *Jones* held that "[t]he disclosure of the privileged communication should generally be limited as much as possible" (para. 86). Major J., dissenting on another point, agreed at para. 28 that "solicitor-client privilege is a fundamental common law right of Canadians.... Anytime such a fundamental right is eroded the principle of minimal impairment must be observed". As I noted earlier in these reasons at para. 20, the minimal impairment standard was also applied in *Descôteaux*, *supra*, where Lamer J. instructed justices of the peace to be "particularly demanding" when issuing warrants to search law offices, so to "limit the breach of this fundamental right [solicitor-client privilege] to what is strictly inevitable" (p. 891).

In November 2001, the Federation of Law Societies of Canada and the Law Society of British Columbia launched an action in the British Columbia Supreme Court challenging the constitutionality of the application of the Act to lawyers, who were made subject to the Act through regulations made under the Act. The Federation believes that the application of the Act to lawyers violates attorney-client confidentiality and privilege and the independence of lawyers.

Ultimately, the Attorney General of Canada and the Federation reached an interim agreement in May 2002, which resulted in repeal of the regulations that subject lawyers to the client identification, recordkeeping, reporting and internal compliance requirements under Part I of the Act. Following consultations, the government intends to put in place a new regime for lawyers that more appropriately reflects their duties. The constitutional challenge was adjourned to November 2005.

The following overview of some of the provisions of the Act and the Regulations will illustrate why the Law Societies in Canada, through the Federation, felt compelled to challenge this legislation.

1. Reporting of suspicious transactions is required when there is a financial transaction in which there are reasonable grounds to suspect that the transaction is related to a money laundering offence. A Suspicious Transaction Report includes, among other things,
  - the purpose and details of the transaction, including the type and amount of funds and other institutions or accounts that are involved,
  - account details, including account and branch number, type of account, name of each account holder, date the account is opened and closed, and current status of the account,
  - information on the individual conducting the transaction, including name, address, country of residence, personal and business telephone numbers, government identification (such as a passport number), date of birth, occupation and employer,
  - a detailed description of the grounds to suspect that the transaction is related to a money laundering offence, and
  - any actions taken as a result of the suspicion.
2. The Act prohibits lawyers from disclosing to clients that a suspicious transaction report has been made, or disclosing the particulars of the report.
3. The Act requires lawyers to record and report a large cash transaction involving \$10,000 or more, unless the amount is received from a financial entity or a public body. The information required in a Large

Cash Transaction Report appears to include information similar to that required for the Suspicious Transaction Report.

4. The Act gives individuals authorized by the Director of FINTRAC search powers for the purpose of ensuring compliance with the recording and reporting obligations in Part 1 of the Act.

These powers permit an authorized person at any reasonable time without warrant to enter any premises, other than a dwelling-house, in which the authorized person believes on reasonable grounds that there are records relevant to ensuring compliance with the Act. He or she may examine data on any computer system on the premises and copy records located on the premises. Individuals in the premises must assist the authorized person and provide any information related to the administration of the Act or its regulations that the authorized person may reasonably require.

The Act allows lawyers to claim attorney-client privilege over documents, which an authorized person attempts to examine or copy. If the lawyer claims privilege, he or she must seal the document and preserve it until it is produced to a judge and an order is issued in respect of the document, and provide the authorized person with the name and address of the client so that the authorized person may contact the client to give him or her an opportunity to waive privilege.

After the lawyer makes a claim of privilege, to defend the claim, the lawyer or client may apply to a judge for an order to determine the question of privilege and to require the production of the document to the judge. If neither the client nor the lawyer make the appropriate application, a judge, on the application of the Attorney General of Canada, must order that the lawyer make the sealed documents available to the authorized person.

These search provisions are modelled closely on those in the *Criminal Code*, which as noted above have been struck down as unconstitutional by the Supreme Court of Canada.

5. In Part 2 of the Act, a customs officer may open and examine mail that is exported or imported, without warrant, if the officer suspects on reasonable grounds that the mail contains currency or monetary instruments greater in value than a prescribed amount. There is no protection for attorney-client privilege or confidential information (the protection of attorney-client privilege, discussed below, only applies to Part 1 of the Act.)
6. Breaches of the Act include punishment on indictment by a fine of up to \$2,000,000 and imprisonment for up to five years.

7. The Act provides that nothing in Part 1 of the Act “requires a legal counsel to disclose any information that is subject to solicitor-client privilege.” The extent of solicitor-client privilege is not defined in the Act.

The Federation does not dispute the importance of the objectives of the money laundering legislation. Its position is that, in seeking to achieve those objectives, the Government has overreached and infringed constitutionally protected rights of Canadians to have access to legal services provided by lawyers who are independent of government and who adhere to obligations of loyalty and confidentiality towards their clients.

### **3. The Intellectual Property Institute of Canada’s Request for a Statutory Privilege for Canadian Patent and Trade-mark Agents**

Industry Canada, the Federal Government ministry responsible for the Canadian Intellectual Property Office, called for submissions on whether privilege should be granted to Canadian patent and trade-mark agents. The issue follows a dedicated effort by the Intellectual Property Institute of Canada (IPIC), a voluntary professional organization for agents, to obtain a statutory privilege similar to attorney-client privilege. IPIC’s view is that non-lawyer patent and trade-mark agents experience a competitive disadvantage in not being able to assert privilege on behalf of their clients (many of the agents in Canada are in fact lawyers). The question is complicated by the fact that, on occasion, the Canadian courts have held that if a lawyer agent is acting as an agent and not as a lawyer, the privilege cannot be claimed.

In its submission to Industry Canada in February 2004, the Federation of Law Societies of Canada, as the umbrella organization for all law societies in Canada, said that privilege should not be accorded to these agents, for the following reasons:

1. A commercial or economic justification for privilege is misguided, and does not accord with the reason that attorney-client privilege developed into a recognized constitutional right. The risk of undermining privilege by extending it to patent and trade-mark agents cannot be justified by the competitive disadvantage that primarily affects a relatively small minority of these agents, namely, those practising in independent firms in which no lawyers are employed.
2. Attorney-client privilege is a class privilege and is granted to lawyers for the client’s benefit because the client is seeking legal advice to enforce legal rights. Patent and trade-mark agents do not fall within this class.

3. The privilege is a narrow exception to disclosure in search of the truth, and must be kept narrow. The Supreme Court of Canada in *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 quoted a US decision which affirmed that certain exceptions, known as privileges, are permitted where it can be shown that they are required by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth": *Trammel v. United States*, 445 u.s. 40 (1980), at p. 50.
4. There is a risk that successful similar requests by other professional groups will dilute attorney-client privilege. The legal profession vigorously resists attempts to dilute or encroach upon privilege because of the importance of the privilege in preserving a justice system based on the rule of law. The Federation noted the following statement by a US court in 1885:

The privilege with regard to confidential communications between solicitor and client for professional purposes ought to be preserved and not frittered away. The reason for the privilege is that these may be the free and confident communications between solicitor and client, which lies [*sic*] at the foundation of the use and service of the solicitor to his client.<sup>15</sup>

5. The privilege ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.<sup>16</sup> The rationale is captured in the following language:

Privileges, as exceptions to the general rule, are not lightly created nor expansively construed for they are in derogation of the search for truth. It is appropriate to recognize a privilege only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.<sup>17</sup>

Industry Canada is currently assessing the merits of IPIC's request.

## Conclusion

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<sup>15</sup> *Pearce v. Foster* (1885), 15 Q.B.D. 114 at 119-20 (C.A.)

<sup>16</sup> Wigmore, John Henry, *Evidence in Trials at Common Law*, vol. 8, Revised by John T. McNaughton, Boston: Little Brown, 1961, ¶ 2

<sup>17</sup> *In re Grand Jury Subpoena Duces Tecum*, 112 F. 3d 910 (8<sup>th</sup> Cir.), cert denied, 117 S. Ct. 2482 (1997)

There are legitimate public policy reasons for ensuring that all relevant information is available to address issues of compliance with and enforcement of laws and regulations. The greater public good is often cited as the reason to require lawyers to disclose information that would otherwise be privileged. However, the courts in Canada have made it clear that privilege as an exception to ascertaining the truth also exists for valid and important public policy reasons, and is as essential to the justice system in our jurisdiction as the right to counsel and the right to be tried by an independent tribunal.

As custodians of the privilege, lawyers have the following responsibilities:

- To continue to assiduously protect the rights of the individual to seek in confidence legal advice as part of the collective right of the public to accessible legal services;
- To do what can be done to help the legal profession, the public and lawmakers understand the important purpose and effect of the privilege;
- To ensure that the legal profession's response to challenges to the privilege are grounded in the concepts of the sanctity of the attorney-client relationship and the need to protect the relationship as integral to the justice system; and
- To ensure to the extent possible that the state and bodies operating under the authority of the state or state laws do not require the disclosure of privileged information arising from an attorney-client relationship save in the most exceptional circumstances, and in those circumstances, only to the extent necessary to address the compelling state interest.

Yours faithfully,

Frank N. Marrocco, Q.C.  
Treasurer