2005 C.A. No. 257156

IN THE NOVA SCOTIA COURT OF APPEAL

BETWEEN:

DAN POTTER

APPELLANT

- and -

NOVA SCOTIA BARRISTERS' SOCIETY, STEWART McKELVEY STIRLING SCALES, BLOIS COLPITTS, 2317540 NOVA SCOTIA LIMITED, SOLUTIONSINC LTD., FURTUREED.COM LTD., KNOWLEDGE HOUSE INC., 2532240 NOVA SCOTIA LIMITED AND THE ATTORNEY GENERAL OF NOVA SCOTIA

RESPONDENTS

- and -

FEDERATION OF LAW SOCIETIES OF CANADA

INTERVENER

FACTUM OF THE INTERVENER

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INTRODUCTION

1. Solicitor-client privilege (hereinafter "privilege") arises from the public interest in ensuring that the client receives confidential, candid legal advice and effective, informed representation. This fundamental client right to privilege can only be fostered and protected in the institutional context of an independent legal profession, where the lawyer and the self-governing bar are not beholden to the state. Privilege should not be interpreted in opposition to or balanced against effective professional self-regulation. To conceptualize privilege as an impediment to the regulatory authority of the self-governing bar is to misconstrue the inextricable relationship between privilege and the independent bar which administers and protects it.

2. A lawyer can only be effectively regulated if the regulator has access to the lawyer's work product. Regulation without such access cannot be effective. A client who retains a licensed and regulated lawyer expects both that the lawyer will be required to act in accordance with the terms of licensing and will be held accountable by the authority of the regulatory bar. The investigative responsibilities of a regulatory bar are not dependent upon or restricted to a client initiated complaint. No client ought to have an expectation of controlling the bar's access to such lawyer. No client ought to expect to exercise gatekeeper control over the professionalism of her lawyer. Both client and lawyer recognize by the nature of the legal retainer that a lawyer is not an island unto herself, but is instead always accountable to the self-governing bar for standards of competence and integrity.

3. There is a direct correlation between effective regulation by a self-governing bar and the public confidence that enables statutory delegation of such independent authority. The public interest in the fair administration of justice cannot be served if incompetent or unethical lawyers are permitted to provide advice and representation without regulation by

the licensing authority. The public interest cannot be served by two classes of lawyers: those whose clients do not take issue with controlled access to privileged matters and those whose clients do. If a lawyer's conduct is placed beyond the access of the regulatory authority because of a client's lack of consent, effective regulation will not occur. If effective regulation does not occur, the resulting loss of public confidence will place at risk the statutory regime that ensures the independence of the bar. Accordingly, any interrelationship between a client's substantive right of privilege and the self-governing bar's authority over the client's lawyer with respect to privileged matters must be interpreted in a manner that serves and protects both. That will not occur if the *Legal Profession Act* (hereinafter "the *Act*") is construed as not empowering such controlled access, or alternatively is found to be an unreasonable infringement upon the client's section 8 *Charter* rights.

4. Consequently, the public interest in the effective regulation of lawyers by an independent bar should not be construed as antithetical to privilege, nor should privilege be asserted as an impediment to such regulation. As interpreted both statutorily and by historical common law, both are necessarily bound up with each other and the public interest in the fair administration of justice. The protective envelope of privilege extended by each lawyer to every client is figuratively an envelope administered and overseen by the regulatory bar, pursuant to its purpose described in section 4 of the *Act.* Whether the protective envelope is the responsibility of the individual lawyer or the disciplinary arm of the bar, the security such responsibility provides to the client, as against all the rest of the world, remains equally as effective by one as the other.

5. The Appellant and the Nova Scotia Barristers' Society (hereinafter "The Respondent) have addressed in some detail the issues of statutory construction under review in this appeal. The Federation asserts that the *Act*, interpreted in its proper context, imposes a

lawyer's duty to disclose privileged matters to the Respondent, independent of client's consent. That duty (be it statutory, common law or both), is statutorily acknowledged, if not created, by section 77 (2) in particular. That section refers to the pre-existence of a ".....duty.....to the Society regarding disclosure...." and relieves the lawyer of the obligation to the client (i.e. the obligation of exclusive confidentiality) that arises from extending access to the privileged matters to the Respondent. If, as the Appellant argues, there is no duty to disclose in the absence of client consent, then section 77 (2) would itself be redundant. There would be no reference to disclosure "in accordance with this Act". That point raised, rather than arguing further interpretive aspects of the Nova Scotia legislation, the Federation intends to place these interpretive issues in their broader context, by illustrating and further explaining the concepts described above.

6. The argument portion of this factum commences with an account of the historical rationale for privilege; and in particular, the importance which the jurisprudence places on confidential access to professional legal counsel. Client privacy is more a consequence than the impetus for the genesis of privilege. It is not the client's privacy interests alone which justify the privilege against disclosure of privileged communications to external third parties. It is instead the importance the law places on the effective administration of justice, by encouraging a client's resort to professional legal advice.

7. A client who hires a lawyer hires the professionalism that accompanies the lawyers license. The web of professional obligations which bind the lawyer are owed not only to the client, but also to the Court, to the profession and to the administration of justice as a whole. It is this body of intertwining obligations which in part justifies the special allowance the law makes between lawyer and client to encourage the client to utilize and have confidence in the licensed legal professional. Accordingly, the Federation argues that privilege ought not to be interpreted as an obstacle or competing interest to the effective enforcement of these

professional obligations.

8. The next section of this factum identifies the importance of the particular institutional context in which disclosure of client materials is sought in this case; namely, the controlled conditions of the self-governing bar's disciplinary process. It is clear that the *Act* contemplates the disclosure of privileged materials within the confidential confines of the Respondent's disciplinary process. Conversely, nothing in the *Act* implies such access must be conditional upon consent of the client. The specific revocation of the former section 35 B of the predecessor *Barristers and Solicitors Act* is incontrovertible evidence in that regard.

9. Absent such confidential and controlled access to a lawyer's professional relationship with the client, the effectiveness of the self-governing model would be at risk. Without mandatory access to privileged file materials, the effective regulation of lawyer conduct would instead be conditional upon the discretionary whims or motives of the client. Such client power to place a lawyer beyond the purview of accountability to the profession would scandalize the public interest. A client's control over such professional accountability could make the lawyer improperly beholden to the client, in a manner that would threaten the independence and professionalism of the bar. Such a consequence could not have been the intent of a statutory regime designed to safeguard the public interest in an independent and professional bar.

10. The final section of this factum examines prior judicial decisions regarding the interrelationship between privilege and the self-governing bar's right of access to privileged communications. Although the results in the Canadian cases are favored, following a comparable line of English authorities, the Federation takes some issue with the line of reasoning in certain of these cases. In particular, the cases sometimes permit the substantive right of privilege to be overridden where the public interest claims priority. The

Federation opposes specifically and in principle such incidental erosion of the substantive right of privilege. Such balancing of competing interests creates an analytical framework by which erosion may occur insidiously on a case by case basis. The Federation as a representative voice of the self governing bars does not wish its members' necessary function in the administration of justice to be perceived as a further erosion of that which they all seek to protect. Nor was that the intent of the *Legal Profession Act.*

11. The Federation submits that this impugned legal reasoning fails to adequately account for the special status, responsibilities and capacities of the self-governing bar. The Federation submits that the constitutional imperative of an independent bar must be upheld in order to uphold the constitutional imperative of privilege. In the context of encroachment on privilege, the thrust of the Federation's factum is to differentiate a regulatory bar from law enforcement agencies and other third parties who pierce the substantive legal rights and/or interests of the client. In assessing the constitutional reasonableness and proportionality of the controlled access sought to be exercised by the regulatory bar, the nature and capacity of the regulatory bar vis a vis its members, including its traditional emphasis on the sanctity of privilege, are to be considered. Such controlled access to privileged material in a manner that expands the envelope of protection, from the individual lawyer to the regulatory bar, is a minimal impairment that is justified by the protection such access provides to the independence of the bar and the resulting preservation of privilege as a substantive client right.

12. The Federation has a well documented record of championing the sanctity of solicitor client privilege in various forums and courts across Canada; see, *e.g.*, *Federation of Law Societies of Canada v. Canada (Attorney General)* (2002) 203 N.S.R. (2d) 53 (S.C.), successfully challenging the enforcement of money-laundering reporting requirements against lawyers. In this appeal, the Federation seeks to further bolster the sanctity of

privilege by identifying and applying the principles which underlie it.

PART I - CONCISE STATEMENT OF FACTS

13. The facts are concisely set out in the factums of the Appellant, at paras 3-16, and of the Respondent, at paras. 11-26.

14. The Federation of Law Societies of Canada was added as an Intervener by Order of Hamilton J.A. dated February 10, 2006. The Federation is the umbrella organization of the 14 governing bodies of the legal profession in Canada. The member law societies of the Federation govern the activities of 88,500 lawyers and Québec's 3,500 notaries. The objects of the Federation are as described in the affidavit of Malcolm Heins filed with the Application for Leave to Intervene.

15. Before seeking this intervener status, the Federation obtained the individual and unanimous approval of all fourteen (14) member law societies in support of the position adopted in this appeal.

PART II - LIST OF THE ISSUES

16. The Issues are identified in the factums of the Appellant and Respondent. The Order of Hamilton J.A. granting leave to intervene in this appeal restricted the Intervener's arguments to the amended first and second grounds of appeal.

PART III - ARGUMENT

17. The Federation submits that the decision of Scanlan J. was correct in upholding the power of the Respondent to compel production of client files, including materials protected

by solicitor-client privilege, in the specific context of a disciplinary investigation by the Society's Complaints Investigation Committee (CIC). However, in the Federation's respectful submission, it was unnecessary and inadvisable for the learned trial judge to characterize this authority as a matter of balancing the public interest in the effective regulation of lawyers against the competing right of privilege. The Federation urges this Honourable Court to avoid unnecessary encroachment upon the substantive right of privilege, by characterizing such access not as another abrogation of privilege, but instead as a statutorily imposed extension of the envelope of confidentiality, without the requirement of client consent, along a continuum of institutional protection already provided by the originating lawyer, her partner, associate, clerk, legal secretary and others who fall within the ambit of the lawyer's duty to protect privilege.

18. The Federation acknowledges that solicitor-client privilege is not an absolute right. That acknowledged, there are only very limited circumstances in which our courts have permitted the breach, exception or abrogation of the substantive legal right of privilege. These exceptions include cases in which public safety has been subject to serious, imminent risk: see *Smith v. Jones* [1999] 1 S.C.R. 455; or when an accused's innocence is demonstrably and necessarily at stake: *R v. McClure,* [2001] 1 S.C.R. 445; *R v. Brown* [2002] 2 S.C.R. 185. In addition, privilege has been held not to exist or apply to communications in the furtherance of a crime or fraud: *R v. Cox & Railton* (1884), 14 Q.B.D. 153; *R v. Shirose* [1999] 1 S.C.R. 565. Privilege has been specifically abrogated by statute: *Descôteaux v. Mierzwinski* [1982] 1 S.C.R. 860 [*Descôteaux*]; *Pritchard v. Ontario (Human Rights Commission)* [2004] 1 S.C.R. 809 [*Pritchard*], but only in very limited circumstances, and subject to constitutional scrutiny for reasonableness: *R v. Lavallee, Rackel & Heintz* [2002] 3 S.C.R. 209. Finally, privilege may be waived by the client, either expressly or by clear implication, such as by operation of statute. In the latter case, the waiver has been

deemed to occur only for the limited purpose of the statute at issue: *Interprovincial Pipe Line v. Minister of National Revenue*, (1995) 102 F.T.R. 141 (T.D.).

19. Scanlan J's widening of the existing, narrow classes of exceptions, on the basis of a competing public interest in the effective regulation of lawyers, is at odds with the principles underlying the right of privilege. The Federation respectfully submits that such a balancing approach is also contrary to the weight of recent leading authorities. In the Federation's view, any balance is better found within the intertwining threads of the privilege rule itself, having regard to the client's overlapping expectations of privacy and professional integrity, including independence and competence.

20. Put simply, there can be no client expectation of unlimited confidentiality. That has always been the case in Canadian law. It is incumbent upon every lawyer to explain the parameters and function of privilege to an inquiring client, including the circumstances where it will not protect the client. The client cannot use the four walls of a lawyer's office to fulminate upon or commit a crime. Neither can the client expect a lawyer's professional misconduct to be beyond scrutiny, whether by the lawyer's partners, or employer, or the regulatory authority that licensed the solicitor client relationship in the first instance.

Solicitor-Client Privilege in Context

21. The effectiveness of solicitor-client privilege stands as one of the truest tests of our legal system's commitment to a client's access to professional legal counsel, as a fundamental prerequisite for the fair administration of justice. The privilege afforded to communications between lawyer and client, and the broader professional obligation of confidentiality, spring from the common law's overarching commitment to ensure that a party to a legal dispute - be it civil, criminal or administrative - has professional advice and representation which is both effective and loyal. To be effective, counsel must have regard

to the full and complete circumstances of the client's situation. To have the necessary confidence to reveal such circumstances in their entirety, the client must be assured that the law, and the legal system more generally, will respect the lawyer's overriding professional obligation of confidentiality and secrecy. This underlying rationale has been observed in countless decisions of courts across the common law world.

22. The rationale for solicitor-client privilege as it is understood today is generally considered to have been first expressed in two decisions of Lord Brougham LC given in 1833: *Bolton v. Corporation of Liverpool*, (1833) 1 My. & K. 88; 110 E.R. 614 [*Bolton*]; and *Greenough v. Gaskell* (1833) 1 My. & K. 98, 110 E.R. 618 [*Greenough*]. In the former, the City had asked its solicitor for an opinion as to its prospects of success in seeking dues and tolls from local merchants pursuant to its ancient rights and privileges. The defendant asserted a right to inspect the City's instructions to the solicitor. Lord Brougham observed,

> It seems plain that the course of justice must stop if such a right exists. No man will dare to consult a professional advisor with a view to a defence or enforcement of rights if discovery of submissions to counsel exists. ... But without such communication no person can safely come into a Court either to obtain redress or to defend himself. [at 617]

23. His Lordship gave a more expansive account of this same rationale in *Greenough, supra*. His Lordship observed:

> ... [I]t is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case. [at 621]

24. In *Anderson v. Bank of British Columbia* (1876) 2 Ch. D. 644, Jessel MR wrote:

> "The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him, should be kept secret, unless with his consent … that he should be enabled properly to conclude his litigation." [*Anderson* at 649]

25. The judicial pronouncements on the underlying purpose for the privilege have remained relatively stable since 1833. In *R v. Shirose*, *supra,* Binnie J, for a unanimous Court, remarked, "The solicitor-client privilege is based on the functional needs of the administration of justice. The legal system, complicated as it is, calls for professional expertise. Access to justice is compromised where legal advice is unavailable." [at para. 49].

26. In recent Canadian decisions this rationale has been explained in terms more aligned with the law's concern to promote rights and individual autonomy, but always consistent with the fundamental purpose. In *General Accident Assurance Co. v. Chrusz*, (1999) 180 D.L.R. (4th) 241 (Ont C.A.) [*Chrusz*], Doherty J.A., partly in dissent but not on this point, sought to update the traditional understanding, commenting that the purpose of privilege:

> "... goes beyond the promotion of absolute candour in discussions between a client and her lawyer. The privilege is an expression of our commitment to both personal autonomy and access to justice. Personal autonomy depends in part on an individual's ability to control the dissemination of personal information and to maintain confidences. Access to justice depends in part on the ability to obtain effective legal advice. The surrender of the former should not be the cost of obtaining the latter. By maintaining client-solicitor privilege, we promote both personal autonomy and access to justice." [at para. 92]

27. Doherty J.A. then quoted J.W. Strong, ed., *McCormick on Evidence*, 4th ed. (St. Paul, Minn.: West Publishing Co. 1992) at 316-7:

> "At the present time it seems most realistic to portray the attorney-client privilege as supported in part by its traditional utilitarian justification, and in part by the integral role it is perceived to play in the adversary system itself. Our system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong tradition of loyalty attaches to the relationship of attorney and client, and this tradition would be outraged by routine examination of the lawyer as to the client's confidential disclosures regarding professional business. To the extent that *the evidentiary privilege, then, is integrally related to an entire code of professional conduct*, it is futile to envision drastic curtailment of the privilege without substantial modification of *the underlying ethical system to which the privilege is merely ancillary*." [quoted in *Chrusz* at para. 93]. [emphasis added].

28. In keeping with this widening appreciation of the value of confidentiality, and the lawyer's professional duty of loyalty more generally, the privilege is now recognized in Canada as not just an evidentiary rule, but a fundamental civil right: *Solosky v. Canada* [1979] 1 S.C.R. 821 [*Solosky*]; *Descôteaux*, *supra*, at paras. 26-27. In *Descôteaux*, which concerned a police search of a legal aid office, Lamer J., as he then was, expressed the wider view as follows:

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.
>
> [at para. 27]

29. Most recently, in *Société d'énergie Foster Wheeler Ltée v. Société intermunicipale de*

gestion & d'élimination des déchets inc. [2004] 1 S.C.R. 456 [*Foster Wheeler*], LeBel J remarked that the Canadian jurisprudence, "clearly establishes the fundamental importance of solicitor-client privilege as an evidentiary rule, a civil right of supreme importance and a principle of fundamental justice in Canadian law that serves to both protect the essential interests of clients and ensure the smooth operation of Canada's legal system." [at para. 34].

30. As the underlying rationale for privilege has come more clearly into focus, expanding to an elevated principle of fundamental justice, it has become increasingly clear that privilege will not be casually infringed on the basis of competing considerations. Only in the clearest and most necessary of circumstances will our courts sanction such infringement. In *Smith v. Jones, supra*, at para. 74, Cory J. remarked that it would only be in "rare" circumstances that a compelling public interest would warrant setting aside the privilege. In *McClure, supra*, at para. 46, Major J. observed that "solicitor-client privilege should be set aside only in the most unusual cases." Further, at paragraph 35: "…solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis." The same point is made in *Pritchard, supra,* at para. 17.

31. Despite the foregoing dicta of Major J. warning against a balancing of interests approach to privilege, decisions from the Supreme Court of Canada have allowed a balancing of interests, where the specific facts warrant. In *McClure itself*, for example, Major J. confirmed that privileged information necessary to establish the innocence of the accused would be subject to disclosure, but held that the test must be extraordinarily stringent:

> The privilege should be infringed only where core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction.
>
> Before the test is even considered, the accused must establish that the information he is seeking in the solicitor-client file is not available from any other source and he is otherwise unable to raise a reasonable doubt as to his guilt in any other way. [at paras. 47-48]

32. The other acknowledged exception to privilege arises where public safety is imminently and seriously at risk. Cory J. in *Smith v. Jones*, *supra*, put the test as follows: "First, is there a clear risk to an identifiable person or group of persons? Second, is there a risk of serious bodily harm or death? Third, is the danger imminent?" [at para. 77].

33. These exceptions, by which the privilege is infringed to protect the paramount rights of third parties, stand in contrast with communications made in furtherance of a crime or fraud. In the latter case, the communication has no entitlement to privilege in the first instance.

34. The foregoing infringements upon or exceptions to privilege have client consequences that stand in stark contrast to the issue under appeal. While these traditional exceptions generally result in disclosure of privileged information to unrelated third parties, generally with adverse consequences to the client, the controlled access granted to a regulatory bar results in no disclosure to third parties and continues to protect the client's confidentiality as against all such third parties. While it may not be pivotal to this appeal to define precisely the nature of the legal relationship between client and the regulatory bar, it is something more than a distant third party relationship. The client enters into a retainer with an awareness, specific or general, that the lawyer is subject to a licensing, regulatory regime and that the client herself has rights and responsibilities with respect to such regime. That relationship is an appropriate consideration in assessing the reasonable expectation of client confidentiality in the circumstances where access to privileged matters is extended to the regulatory bar.

35. Privilege rests on the law's respect for the legally unique relationship between client and lawyer. This respect is in part to protect the client's autonomy and privacy. It is also to ensure that a party has the benefit of candid legal advice and effective representation. It is noteworthy that the administration of justice does not protect the privacy of the client's communications with any person, in any circumstance. Rather, the law of privilege protects only those who seek advice from licensed and regulated lawyers. In Manes and Silver's doubly-apt analogy, the solicitor is the other half of the walnut; R.D. Manes & M.P. Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993) at 35. If the confidante is not a lawyer, or is no longer a practising lawyer, or if the lawyer is consulted not as a lawyer but in another capacity, privilege is not afforded to the communication. It is only when a licensed and regulated lawyer communicates in a professional capacity that privilege obtains.

36. Many persons may be learned in specific areas of the law, even capable of giving reliable legal advice. For example, accountants are often acquainted with tax law. Architects and surveyors may be expert in the local planning provisions. Expertise in matters legal is no longer the private domain of lawyers. However, the client's right to solicitor-client privilege has historically been and today remains the private preserve of only one such profession: the licensed and regulated bar.

37. As early as *Calley v. Richards*, (1854) 52 E.R. 406 (Rolls Ct.) it was held that where a client was under a mistaken belief that the lapsed solicitor was still licensed to practice, the privilege would still apply. Cotton J. in *Southwark & Vauxhall Water Co. v. Quick*, (1878) 3 Q.B.D. 315 (C.A.) described the envelope of privilege as follows:

> Privilege only extends to communications with legal advisors, or in some way connected with legal advisors; communications with a most confidential agent are not protected if that confidential agent happens not to be a solicitor. And this proceeds on the principle that laymen (... persons not learned in the law) cannot be

> expected to conduct their litigation without the assistance of professional advisors; *and for the purpose of having the litigation conducted properly*, the law has said that communications between the client and solicitor shall be privileged. [at 321-22] [emphasis added]

38. The reasoning of Denning MR in *Alfred Crompton Amusement Machines Ltd. v. Customs & Excise Commissioners (No. 2)*, [1972] 2 All E.R. 353 (C.A.), put a finer point on the underlying rationale of professionalism, including the duty of confidentiality. In that case he addressed whether communications with in-house counsel would be protected by privilege:

> Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer. For that reason the judge thought that they were in a different position from other legal advisers who are in private practice. I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. *They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges....* I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege; and I have never known it questioned. [at p. 376] [emphasis added]

39. This passage was quoted and endorsed by the Supreme Court of Canada in *Shirose, supra*, at para. 50.

40. The law does not extend privilege to communications between lawyer and client in the furtherance of crime or fraud. This circumstance is not a lifting or an infringement of the privilege; to the contrary, the obligations of a licensed lawyer would make it impossible for such a communication to occur in a professional capacity. Every client is expected to know

that a lawyer, as an officer of the court, can neither counsel nor condone the commission of a crime. Where the communication between solicitor and client constitutes or furthers a crime, then the solicitor-client relationship by definition does not exist, and the privilege cannot be claimed. In the leading 1884 case of *Cox and Railton, supra*, Stephen J. held that:

> "... [A] communication in furtherance of a criminal purpose does not come within the ordinary scope of professional employment. ... In order that the rule [the solicitor-client privilege] may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor, one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. *If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object.* [at 167-68] [emphasis added]

41. The Supreme Court of Canada referred with approval to *Cox and Railton* for this proposition in *Solosky, supra*, [at para. 24], and *Shirose, supra* [at para. 56]. A comment to similar effect was made by Brougham LC in the original case of *Greenough, supra* at 621.

42. A further elaboration was offered by Lord Parmoor in *O'Rourke v. Darbishire*, [1920] A.C. 581 (H.L), later quoted with approval by the Supreme Court of Canada in *Shirose, supra,* at para. 59:

> "The third point relied on by the appellant, as an answer to the claim of professional privilege, is that the present case comes within the principle that such privilege does not attach where a fraud has been concocted between a solicitor and his client, or where advice has been given to a client by a solicitor in order to enable him to carry through a fraudulent transaction. If the present case can be brought within this principle, there will be no professional privilege, since it is no part of the professional duty of a solicitor either to take part in the concoction of fraud, or to advise his client how to carry through a fraud. Transactions and communications for such purposes cannot be said to pass in professional confidence in the course of professional employment." [at 621]

43. Manes & Silver, *supra*, at 87-88, suggest that the unavailability of privilege in such a

situation most fundamentally has to do with the integrity of the legal profession:

> "... it appears that a chief motivation for the crime/fraud exception is to protect the integrity of the legal profession. Many of the cases discuss the danger of a solicitor becoming a party to the crime through the communications to which, if privilege attached, the solicitor could not easily exculpate himself. *The maintenance of professional integrity by excluding some communications from the ambit of privilege is consistent with the overall objective of the privilege, which is to facilitate the operation of the legal system.*"[emphasis added]

44. In summary, the rationale for protecting the right of privilege is not merely client-centred, but goes to the efficacy of the justice system itself. The concept of privilege acknowledges the inherent value to the administration of justice in having litigants resort to professionally licensed counsel. In the creation and growth of this common law concept, the cases on privilege simultaneously recognize the wider constellation of obligations which a solicitor undertakes upon admission to the profession: obligations to the client, to the Court, to opposing parties, and to the public interest in the administration of justice. The essential difference between a licensed and unlicensed legal advisor is the array of professional obligations which ensure the lawyer's competence and conduct when dealing with the client. That is the context in which the client crosses the lawyer's threshold and may thereafter claim the substantive right of privilege. Over the years, the evidentiary rule of privilege evolved into a substantive right, but always in circumstances where the lawyer was regulated according to the rules of the profession.

45. In view of the inherent purposes underlying the substantive right of solicitor-client privilege, the case under appeal finds its context. The Federation respectfully submits that any interpretation of the *Legal Profession Act* that would make the client the discretionary gatekeeper of effective self-governance would inevitably corrode the pillar upon which the substantive right of privilege rests. Put colloquially, the tail would wag the dog if the accountability of the lawyer to her professional licensing body depended on the willingness

of the client to co-operate with the regulatory authorities.

The Independence of the Bar

46. To be truly independent, the Bar must be unbeholden to the state in other than the most general of ways. This independence of the legal profession is now recognized as a cardinal principle of the rule of law. While the assertion of such independence has most frequently been made as the backdrop to claims of solicitor-client privilege, it is now clear that the independence of a self-governing bar may be advanced as a free-standing principle of constitutional law. The solicitor and client relationship, which our courts so sedulously foster and protect, can only be maintained within the context of an independent profession. Privilege, and the client confidence upon which it is based, would be illusory were it not for the institutional independence of the body of legal professionals whose representation the client seeks.

47. The Supreme Court of Canada, in *Canada (Attorney General) v. Law Society of British Columbia (sub nom. Jabour v. Law Society of British Columbia)* [1982] 2 S.C.R. 307 [*Jabour*], observed:

> The independence of the bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. 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. [per Estey J., at para. 52]

48. In 1989, then Chief Justice Brian Dickson addressed a conference of the Ontario Criminal Lawyers Association in the following words:

> At the very heart of the judicial system, especially the trial process, lies the practising bar. The role of the criminal lawyer, whether it be in the presentation of the government's case or in the vigorous defence of the accused, is essential to the western legal tradition. Judges are wont to speak of the independence of the judiciary. Independence of the Bar is also a central characteristic which must be maintained with vigilance and passion. *Without the dignity, independence and integrity of the Bar, impartial justice and the maintenance of the rule of law are impossible*."
>
> [reported in the *Ontario Criminal Lawyers' Association Newsletter*, (1990) 11:1 at 9] [emphasis added]

49. In *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143, McIntyre J. suggested a nexus between the independence of the profession and the special privileges accorded to its members:

> It is incontestable that the legal profession plays a very significant -- in fact, a fundamentally important -- role in the administration of justice, both in the criminal and the civil law. ... [I]n the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state. In the performance of what may be called his private function, that is, in advising on legal matters and in representing clients before the courts and other tribunals, the lawyer is accorded great powers not permitted to other professionals. ... The solicitor is also bound by the solicitor-and-client privilege against the disclosure of communications with his client concerning legal matters. This is said to be the only absolute privilege known to the law. Not only may the solicitor decline to disclose solicitor-and-client communications, the courts will not permit him to do so. This is a privilege against all comers, including the Crown, save where the disclosure of a crime would be involved. ... While it may be arguable whether the lawyer exercises a judicial, quasi-judicial or governmental role, it is clear that at his own discretion he can invoke the full force and authority of the state in procuring and enforcing judgments or other remedial measures which may be obtained. It is equally true that in defending an action he has the burden of protecting his client from the imposition of such state authority and power. By any standard, these powers and duties are vital to the maintenance of order in our society and the due administration of the law in the interest of the whole community. [at para. 37]

50. It is self-evident that a lawyer beholden to an all-intrusive state cannot serve a client with the undivided loyalty which the administration of justice requires and the client expects. It is perhaps less self evident but equally clear that undivided professional loyalty to client is

not absolute personal loyalty to client: such loyalty must remain within the context of the professional standards set by the independent bar. It is in this sense that the loyalty owed by the lawyer to client depends on the institutional independence of the profession, not simply the lawyer acting in his personal capacity without reference to her licensing authority.

51. In *R v. Neil*, [2002] 3 S.C.R. 631, Binnie J. examined the essential link between the principle of loyalty to client and the independence of the bar:

> Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies: *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14 (S.C.C.), at para. 2; *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.). As O'Connor J.A. (now A.C.J.O.) observed in *R. v. McCallen* (1999), 43 O.R. (3d) 56 (Ont. C.A.), at p. 67:
>
> > ... the relationship of counsel and client requires clients, typically untrained in the law and lacking the skills of advocates, to entrust the management and conduct of their cases to the counsel who act on their behalf. There should be no room for doubt about counsel's loyalty and dedication to the client's case.
>
> The value of an independent bar is diminished unless the lawyer is free from conflicting interests. Loyalty, in that sense, promotes effective representation, on which the problem-solving capability of an adversarial system rests. [at paras. 12-13]

52. Justice Binnie's reference to conflicting interests is properly understood in relation to external third parties, whether the state, opposing litigants or others. By contrast, accountability to the independent profession, in a manner that protects the confidences of the client and her rights as against all the rest of the world, is not a conflicting interest, but an integral component of the client's expectation of loyalty.

53. One of the more forceful expressions of this nexus between client expectation of privilege and the independent bar is found in the commentary of G.D. Finlayson (later justice of the Ontario Court of Appeal), in a 1985 article, "Self-Government and the Legal Profession - Can it Continue?" (1985) 4 *Adv. Soc. J.* 11. He wrote:

> The legal profession has a unique position in the community. Its distinguishing feature is that it alone among the professions is concerned with protecting the person and property of citizens from whatever quarter they may be threatened and pre-eminently against the threat of encroachment by the state. The protection of rights has been an historic function of the law, and it is the responsibility of lawyers to carry out that function. In order that they may continue to do so, there can be no compromise in the principle of freedom of the profession from interference, let alone control, by government.
>
> A vital role of the lawyer is to stand between the citizen and the state, and this role is more important now than ever before. The extent of government interference in the lives of citizens can only be described as massive. It is at every level -- municipal, provincial and federal -- and whether it is for good or ill is irrelevant. The law is the instrument of government and lawyers form the only profession trained in the law.
>
> Lawyers could not advise citizens as to their responsibilities with respect to particular legislation or governmental action if they cannot maintain their independence as individuals. It is almost impossible to do this if the society that governs them is under the day to day control of government. It is imperative that the public have a perception of the legal profession as entirely separate from and independent of government, otherwise it will not have confidence that lawyers can truly represent its members in their dealings with government. [at 11]

54. Put simple, no lawyer is an island. Accountability to the client does not mean accountability through the client. Inherent in the concept of an independent bar is the lawyer's status within the profession. The value placed on the lawyer's duty of undivided loyalty to the client in *Neil* does not authorize the creation of a class of unregulated hired guns, accountable only at the behest of the client. To the contrary, as intimated in *Andrews*, the privileges and authorities granted a lawyer as an advocate for the client, including solicitor-client privilege, belong to the profession and are merely licensed to the member. Nothing within the *Legal Profession Act* or the rulings of our courts suggest that loyalty to the client trumps regulatory accountability. Accountability and loyalty to the client are intertwined and assured through the regulatory oversight of the self-governing bar, not the contractual relationship between lawyer and client.

55. Such independence is professional. It is not the independence of individual *lawyers* to do as they wish. It is independence exercised through the licensing authority of the

profession to which each lawyer belongs. It is the membership in and accountability to the profession which entitles practising lawyers to accept the responsibilities and privileges of the profession, including the duty of undivided loyalty and the protection of the sanctity of solicitor-client privilege. Properly understood, the independence of the legal profession embodies both freedom from improper interference by the state and effective, internal regulation of members.

56. The independence of the bar is secured by a variety of institutional safeguards, the most prominent and critical of which, in the Canadian context, is the self-governance of the profession. That safeguard is not invincible. To a general public uninitiated in the history of the legal checks and balances that underpin the Canadian administration of justice, the value of such independence is not self-evident. Perhaps illustrative of the legal profession's failure to effectively communicate and rebut adverse professional stereotypes, lawyers and their professional bodies are with predictable frequency called upon to justify and explain why statutory enactments for governing lawyers should be any different from those of other professions. Beyond legal circles in Canada, legal self-governance is not yet considered a self-evident good, but rather a statutory and revocable privilege that must at once protect the independence of the members of the profession, while effectively regulating their conduct. Those two responsibilities of a regulatory bar are inextricably woven together; to be effective, the bar's defence of institutional independence is effectively proportionate to its rigorous enforcement of professional obligations. In practical terms, one of the most pressing threats to the independence of the profession would be the loss of public confidence in the integrity and competence of lawyers, occasioned by the ineffective regulation of professional conduct. In the context of this appeal that correlation is neither hypothetical nor distant.

57. Absent effective self-regulation, interference or regulation by the state in ever more

intrusive forms will be the most probable consequence. As Canada's foremost contemporary commentator on legal professional responsibly and discipline observes:

> ... [M]any members of the public will continue to consider self-government by lawyers to be regulation by and for a self-interested, unaccountable elite. Pressure will be renewed to entrust the regulation of the legal profession, and particularly its disciplinary function, to a public agency responsible directly to the government.
>
> This would be a fundamental mistake. The main threat to the independence of the bar comes from government, and independence from government is crucial in a democracy.
>
> Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, 3rd ed. (loose leaf) (Toronto: Thomson Carswell, 2001) at 27-15.

58. Thus, in the context of one of the more prominent failures of the legal profession to adequately regulate itself, LeBel J. in *McCullock Finney v. Barreau (Québec)* [2004] 2 S.C.R. 17, saw fit to introduce his reasons, on behalf of a unanimous Supreme Court, with a subtlely camouflaged warning about the correlation between independence and effective self-governance:

> An independent bar composed of lawyers who are free of influence by public authorities is an important component of the fundamental legal framework of Canadian society. In Canada, our tradition of allowing the legal profession to regulate itself can largely be attributed to a concern for protecting that independence and to lawyers' own staunch defence of their autonomy. In return, the delegation of powers by the State imposes obligations on the governing bodies of the profession, which are then responsible for ensuring the competence and honesty of their members in their dealings with the public. [at para. 1]

59. The case under appeal does not turn on the insulation of the profession from state regulation *per se.* *T*he constitutional enforceability of the self-governing status of the profession may be left for another day. In this case, the Legislature of Nova Scotia in the *Legal Profession Act* has unconditionally embraced self-governance as the means by which the integrity of the legal profession, encompassing both its independence and the obligations of its members, is to be maintained. Nevertheless, the independence of the bar

remains a live issue, to the extent that a narrow and restrictive statutory interpretation of the *Act* would hinder effective self-regulation.

60. To summarize, privilege requires lawyer loyalty to client. Loyalty to client requires independence from the state, including powers of self-regulation. Limitations on the power to regulate members, and specifically placing the lawyer beyond the reach of the regulatory bar or allowing the client to be the discretionary gatekeeper of such regulatory power, would bring the legal profession's self-governance into public disrepute and make it vulnerable to attack. Diminished powers of self-regulation would threaten the independence of the bar, which in turn would inevitably undermine the very privilege which the Appellant purportedly seeks to protect.

61. It should not be necessary to demonstrate empirically how the institutional independence of the bar, and the solicitor-client privilege which depends on it, would fare if self-regulation were to be eroded. This Court can look to societal experience for premonitions of the consequences of stripping a self-governing bar of its authority to investigate and regulate certain of its members. The Legislature has adopted self-governance as the means by which independence and professional conduct are to be reconciled and advanced. It is left to this Court to give full effect to that intent.

Privilege and the Discipline of Lawyers

62. Self-governing bars have long thought it necessary to have access to client files in regulatory matters, whether the client consents or not. Lawyers subject to disciplinary proceedings, and occasionally their clients, have in some cases resisted that access. The resulting jurisprudence offers a helpful range of perspectives by which to assess the statutory provisions at issue in this appeal.

63. Notwithstanding certain differences in approach to the underlying principles, the cases are consistent with the following rule: where a statute expressly or by necessary implication provides for the production of privileged file materials to the regulatory bar, and privilege is otherwise preserved and protected by law, the files must be produced. The constitutional reasonableness of such a statutory requirement depends, the Federation submits, on the distinctive status and capacities of an independent, self-governing bar.

64. The discussion inevitably turns at the outset to the reasons of Denning MR in *Parry-Jones v. Law Society* [1968] 1 All E.R. 177 (C.A.) [*Parry-Jones*]. In that decision, which is summarized in the Respondent's factum at 37-38, Lord Denning effectively held that the law in general, including law society rules, would "override" legal professional confidentiality such that the law society could examine client files in an inspection of the solicitor's accounts. According to Denning MR, this was because the solicitor's obligation of confidentiality arises as a matter of contract between the solicitor and client. That contract must be taken to include the implication that the solicitor will obey the law, including law society rules. [at 178] Denning MR further held that the necessary limit on confidentiality would also entitle the law society to use the information in a subsequent hearing, but that in all other respects the privilege would persist. [at 179]

65. By proceeding on such a narrow contractual view of the principles and purposes underlying the privilege, *Parry-Jones* in its particulars was not well-equipped to survive the later recognition of privilege as a substantive right. Thus, some 34 years later in *R (on the application of Morgan Grenfell & Co Ltd) v. Special Commissioner of Income Tax*, [2002] 3 All E.R. 1 [*Morgan Grenfell*], the House of Lords revisited *Parry-Jones* in light of the elevation of privilege from a mere contractual duty and rule of evidence to a fundamental principle of justice. A portion of the decision of Lord Hoffman is set out in the factum of the Respondent at para. 39.

66. Lord Hoffman felt it necessary to re-visit the *Parry-Jones* decision because, in his view, it was that decision which had led Parliament to draft in a somewhat confusing manner the tax legislation at issue in *Morgan Grenfell.* The legislation provided expressly for the protection of privileged documents in the hands of the solicitor, but was silent on the ability of the tax authorities to compel production of privileged materials in the hands of the client. Lord Hoffman considered this to be the unintended result of *Parry-Jones*; Parliament thought it necessary to expressly insulate lawyers' offices from what was thought to be the principle in *Parry-Jones*, whereas it was already self-evident that the client could not be compelled to produce such documents [at paras. 25-33].

67. Lord Hoffman addressed *Parry-Jones* in order to reverse the common law presumption which he was concerned might otherwise be drawn from Denning MR's reasons. In light of the substantive protection of privilege as a fundamental right, he held that there should be no question that Parliament could only allow for the inspection of privileged materials by tax authorities by express statutory language, or necessary implication thereof [at para. 8].

68. In this context it was not necessary to confirm the result in *Parry-Jones*, but Hoffman LJ nevertheless did so. He went out his way to justify the result, not on the basis that privilege was a mere contractual duty, subject to the law of the land, but rather that in his view no breach had taken place because privilege was otherwise maintained within the law society. He considered such controlled access not to be a breach or, at worst, a mere technical breach, authorized by the regulatory bar's statutory powers. He observed that, "It does not seem to me to fall within the same principle as a case in which disclosure is sought for a use which involves the information being made public or used against the person entitled to the privilege." [at para. 32]

69. This overly broad justification for exempting law society powers of inspection from the normal protections afforded to privileged materials is troubling. If interpreted too literally, it suggests a narrowing of the general principle such that, so long as the information disclosed will be shielded from the public and not used against the client, privilege may not apply. Such criteria, made accessible to other third parties, could substantially erode the sanctity of privilege.

70. The Federation submits that this dicta should be read in context, as a somewhat off-hand attempt to venture a rationale for a result which may have struck Lord Hoffman intuitively as correct, in the apparent absence of argument or the necessity of deciding the point. The Federation submits that the absence of adverse impact on the client's legal interests and the extent of circulation of the accessed materials are not by themselves appropriate criteria. The better view is that, in the context of the regulatory bar, there was either no breach or at most a technical breach, which Lord Hoffman suggested but did not explain.

71. Sections 49.3(4)(b) and s. 49.8(1) of the Ontario *Law Society Act*, R.S.O., 1990, c.L.8, which expressly provide the power to compel production of privileged materials without client consent, were enacted as a statutory expression of what was understood by the Law Society of Upper Canada to be this common law right of the regulatory bar to access privileged materials without client consent; see Ontario, Legislative Assembly, Standing Committee on Administration of Justice, No. J030 (December 7, 1998) at 1740 (Clayton Ruby); Ontario, Legislative Assembly, Standing Committee on Administration of Justice, No. J031 (December 8, 1998) at 1610-1620 (Gavin MacKenzie).

72. In Nova Scotia, the Legislature omitted from the new *Legal Profession Act* any counterpart to section 35B of the former *Barristers and Solicitors Act*, R.S.N.S. 1989, c.30.

For a brief period, this section required the client's express consent for disclosure. In the Federation's submission, that 1996 statutory aberration, inserted contrary to the practices of most self-governing bars across Canada, was a departure from the common law position that has traditionally prevailed. Its conspicuous omission from the new *Act* was both an express indication of legislative intent and also a statutory reversion to the traditional common law position.

> *An Act to Amend Chapter 30 of the Revised Statutes, 1989, the Barristers and Solicitors Act, and to Amend Chapter 58 of the Revised Statutes, 1989, the Cape Breton Barristers' Society Act,* S.N.S.1995-96, c. 18, s. 6.

73. The Canadian cases on point, including *Greene v. Law Society (British Columbia)* (2005) 40 B.C.L.R. (4th) 125 (S.C.); *Miller v. Miller*, [2002] N.J. No. 371 (Nfld C.A.); and *Re Robertson Stromberg* (1995), 122 D.L.R. (4th) 551 (Sask. C.A.) are summarized in the factum of the Respondent at paras. 40-45, 87, and 99-100. The decision of Scanlan J. fell in step with these cases, observing that in general, where the public interest is sufficiently pressing and the procedural protections against external disclosure are sufficiently strong, the legislation will be upheld.

74. Where the legislation does not contemplate or reference the disclosure of privileged information in regulatory bar proceedings, and therefore makes no provision for the protection of privilege from further disclosure, the result has been otherwise in England. The point was put squarely in *B and others v. Auckland District Law Society and another*, [2004] 4 All E.R. 269 (Privy Council) [*Auckland*]. The Federation submits this recent judicial trend is both distinguishable and not good authority in Canada, for the reasons described elsewhere in this factum.

75. *Auckland* was an appeal to the Privy Council from the New Zealand Court of Appeal.

Responding to a complaint, the New Zealand Law Society had obtained file materials from the law firm on its express undertaking of confidentiality. It later sought to keep the documents, and to compel the production of further materials, pursuant to the *Law Practitioners Act* (NZ) 1982. The applicable sections provided, in the investigatory stage, a general duty of disclosure of all relevant documents and materials, but with no specific reference to privileged materials. The *Act* further provided for a similarly general duty of disclosure at the hearing stage, but specifically confirmed that the same "privileges and immunities" as would apply "in a Court of law" applied to the disciplinary hearing; see paras. 25-27. This was argued as a statutory bar to the Law Society's access to privileged materials. There were no protective provisions against third party disclosure similar to those found in s.77 of the Nova Scotia *Act* and in counterpart legislation across Canada.

76. Millett LJ reviewed certain of the historical authorities canvassed above, and others besides. In particular, he relied on *R v. Derby Magistrates' Court , ex parte B and another* [1995] 4 All E.R. 526 (HL) [*Derby Magistrates*], wherein privilege was acknowledged by the Lords to be not merely a rule of evidence, but a fundamental condition upon which the administration of justice depended; per Lord Taylor CJ at 540-541. *Derby Magistrates* represented a marked departure of the English authorities from the law in Canada. The issue was akin to that in *McClure, supra*. The accused sought evidence of the instructions given to his solicitors by a man previously tried and acquitted for the same murder. The former accused had confessed but later retracted his confession. Even in this compelling case, unlike the current law in Canada, the Lords effectively declined to carve out an 'innocence at stake' exception. Nicholls LJ was nonplussed by the suggestion that in compelling cases the privilege would have to yield to more pressing interests. Noting that balancing in any given context, from criminal to family law, would pit the right of privilege against any number of highly compelling interests, he commented:

> "... [T]here is no escaping the conclusion that the prospect of a judicial balancing exercise in this field is illusory, a veritable will-o'-the-wisp. That in itself is a sufficient reason for not departing from the established law. Any development in the law needs a sounder base than this. ... Confidence in non-disclosure is essential if the privilege is to achieve its *raison d'être*. If the boundary of the new incursion into the hitherto privileged area is not principled and clear, that confidence cannot exist." [at 545].

As Lord Taylor CJ put it, at 541-42:

> "….If a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of the client's individual merits."

77. In the Canadian case of *Smith v. Jones, supra*, Cory J. expressly declined to follow the absolutist approach in *Derby Magistrates*, preferring instead one that would admit of "certain well-defined and limited exceptions" [at para. 53]. It is now clear as a general matter that Canadian law adopts an approach which permits the limitation of the interests underlying solicitor-client privilege, but only in those rare and exceptional cases where interests of similar or greater magnitude are at stake.

78. In *Auckland*, on the basis of *Derby Magistrates*, Millett LJ rejected the balancing approach adopted by the New Zealand Court of Appeal, which favoured the broader public interest in the bolstering of the integrity of the profession, by allowing the law society access to such materials. Millett LJ expressly acknowledged that the decision was not in accordance with Canadian law [at para. 55].

79. These differing approaches between Canada and England may be more apparent than real. As Millett LJ pointed out, the Court was ultimately bound to determine the appeal as a matter of statutory construction [at paras. 56-57]. Millett LJ followed *Morgan Grenfell, supra*, in holding that legal professional privilege could only be excluded by express statutory language, or necessary implication. In a nevertheless useful passage quoted from *Morgan Grenfell, supra*, he observed:

> "A necessary implication is not the same as a reasonable implication … A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation." [*Morgan Grenfell, supra*, per Lord Hobhouse at para. 45; quoted in *Auckland* at para. 58]

80. Millett LJ added:

> "A useful test is to write in the words "not being privileged documents" and ask, not "does that produce a reasonable result?" or "does it impede the statutory purpose for which production may be required?" but "*does that produce an inconsistency*?" or "*does it stultify the statutory purpose*?" The circumstances in which such a question would receive an affirmative answer would be rare. But a statutory right to require production of correspondence between a person and his solicitor for the purpose of obtaining legal advice, for example, would obviously be inconsistent with the existence of a right to withhold documents on the ground of legal professional privilege. And unless a taxing master could require the production of privileged documents it would be impossible for him to perform his function of taxing a solicitor's bill of costs ..." [at para. 59] [emphasis added]

81. The Federation submits that the above-noted tests, applied to the Nova Scotia *Act*, would sustain the interpretive position being argued by the Respondent and Intervener.

82. Indeed, *Auckland* was distinguished in a later decision of the English Divisional Court, in a case more or less similar on its facts to *Auckland*, in part because the English statute, like the Nova Scotia *Act*, did contain a "comprehensive regime governing the powers of the Society in connection with documents" and providing protection with respect thereto; *Simms v. Law Society,* [2005] EWHC Admin 408.

83. While the Federation supports the end result reached in the Canadian decisions on point, in its respectful submission none of them adequately address the distinct context within which the provisions of the *Legal Profession Act* operate. The status of a regulatory bar within the administration of justice makes it distinguishable from others who apply to

erode the sanctity of privilege. None of the foregoing cases advance a principled rationale for allowing the public interest to "override" the substantive right of privilege in accordance with the very high threshold for such exceptions established by the Supreme Court of Canada. Further, none articulate a compelling basis for the position suggested by Lord Hoffman's comments in *Morgan Grenfell*; that the privilege is not breached at all in these circumstances. Lord Hoffman's less than exhaustive analysis was to the effect that privilege might not be breached where the materials were not to be used against the client and were otherwise kept private. In the Federation's submission, it is constitutionally preferable to avoid the balancing or override approaches and instead interpret such statutory right of controlled access in the context of the distinct status and capacities of the self-governing bar *vis-a-vis* the right of privilege, as identified in the previous sections of this factum.

84. Reflective of the Federation's preferred approach, the Supreme Court of Canada has cautioned that rights which are fundamental to the administration of justice, and solicitor-client privilege in particular, should not be assessed in opposition to competing interests where that would inadequately characterize the interrelationship of principles at stake. Arbour J. in *Lavallee, supra*, considered whether the traditional balancing analysis was appropriate in the context of solicitor-client privilege. She remarked:

> Where the interest at stake is solicitor-client privilege -- a principle of fundamental justice and civil right of supreme importance in Canadian law -- the usual balancing exercise referred to above is not particularly helpful. This is so because the privilege favours not only the privacy interests of a potential accused, but also the interests of a fair, just and efficient law enforcement process. *In other words, the privilege, properly understood, is a positive feature of law enforcement, not an impediment to it.* [at para. 36] [emphasis added]

85. Underlying this passage is the traditional rationale for privilege: that having a client resort to professional counsel is in the interests of the justice system as a whole. From a

broader perspective, the Court is cautioning against the general impulse to frame disputes involving fundamental rights in stark, adversarial terms. Fundamental rights need not be subject to a balancing exercise against competing interests, where that approach would fail to accurately comprehend the necessary connections between those interests and the right in question.

86. It is in this regard that the decision of the Privy Council in *Auckland* is most informative and most at odds with the prevailing approach in Canada. *Auckland* narrowly enforces the right of solicitor-client privilege with no consideration of the context in which the privilege claim is being made; and in particular, of the distinct position of the self-governing bar as the regulator and enforcer of the professionalism upon which the right of privilege is premised. Its analysis fails to adequately appreciate - or for that matter even consider - the implications of the result it favours. A finding that a self-governing bar is not entitled to privileged materials in the context of a discipline proceeding must inevitably stultify the purpose of the *Act*, which is to safeguard the public interest in the practice of law.

87. The Canadian decisions on point have taken a more purposive approach. Those cases, including that of Scanlan J. under appeal, have generally allowed that the interests which underlie solicitor-client privilege must, like other rights, be subject to interests of more pressing concern where circumstances warrant. Those cases, however, to the extent that they permit an indistinct notion of 'the public interest' to override the privilege in a general sense, fail to adequately acknowledge the status accorded to solicitor-client privilege in recent decisions of the Supreme Court of Canada. Scanlan J., was evidently troubled by this. He recognized, at para. 29, that allowing privilege to be overridden by the public interest in the regulation of lawyer conduct required him to rely on jurisprudence which pre-dated the *Charter*-era decision in *Lavallee, supra*.

88. In balancing the public interest against privilege, the Federation respectfully submits that Scanlan J. failed to address the implicit direction in *Lavallee,* that rights and interests ought not to be examined in opposition to each other, without reference to the underlying context. In the larger picture, rights and fundamental principles which at first blush may appear to be in conflict may in fact be consistent with or even dependent upon each other.

89. In the Federation's submission, the Respondent has the power to compel production of privileged materials for use in a disciplinary investigation and hearing, not because the public interest warrants trenching on the right of privilege, but rather because privilege itself depends upon the integrity of the profession, protected by the regulatory authority of the self-governing bar. It is no breach of privilege to require that privileged documents be disclosed within the profession, so as to uphold the integrity of the institution on which the privilege depends. In such circumstances, both by straightforward statutory construction and logical necessity, the envelope of privilege is extended to encompass and bind the lawyer's governing body pursuant to the same obligations which bind the lawyer herself, and all who are associated with her.

90. This interpretive approach best comprehends, in principle, the arrangement of interests at stake in this appeal. Section 4 of the *Act* provides that the purpose of the Nova Scotia Barristers' Society is to uphold and protect the public interest in the practice of law. Section 4 places the Respondent in a distinct position of responsibility for protecting the public interest in the integrity of the legal profession, and thereby the administration of justice. The position of the Appellant Potter, seeking to raise a serious impediment to the ability of the Society to regulate his lawyer, would stultify this statutory purpose.

91. When a client makes a complaint about a lawyer to the regulatory bar, privileged matters are shared in confidence, with a continuing expectation of privacy. The client does

not waive privilege: she shares its confidences and the envelope is extended. To otherwise require waiver would put the client in the position of having to waive a fundamental right in order to initiate a review of the member's conduct. Canadian courts have recently dispelled the intuitive but incorrect belief that the client, by making a complaint, is deemed to waive privilege; see, *e.g.*, *Law Society of Upper Canada v. Telecollect Inc.* (2001) 56 O.R. (3d) 296 (S.C.J.) at paras 60-61; *Greene, supra*, at para. 52.

92. The regulatory concerns which justify such limited disclosure, absent the client's waiver but within the envelope of privilege, are just as pressing where the investigation is initiated by a third party or the self-governing bar itself. Nothing within the *Legal Profession Act* suggests any distinction as far as the obligation of disclosure is concerned. The reliability of regulatory authority over a member cannot depend on the identity of the complainant. The reason for requiring disclosure in all cases, whether the client is the complainant or not, is the same: the regulatory authority must be able to enforce the fundamental obligations of the profession, having regard to all of the facts.

93. The Federation's preferred analysis proceeds on the basis envisioned by the statutory provisions at issue. It is not necessary to have recourse to the legal fiction of an implied waiver, or to make a further categorical exception to privilege. Rather, pursuant to the express provisions of the statute, as articulated in the Respondent's factum, the privilege which binds the lawyer encompasses the self-governing bar, so as to permit the disciplinary body to examine and rely in its decision-making on material which nevertheless remains privileged as against all other third parties.

Conclusion

94. In summary, the *Legal Profession Act* provides that the Respondent is authorized to compel the production of solicitor-client privileged materials in the context of a disciplinary

investigation and any subsequent proceedings. Legal professional discipline matters are distinguishable in two material aspects from all other third party situations in which privilege is breached and confidences lost, to the detriment of the client.

95. First, the interests justifying the controlled access to privileged file materials are integral to and bound up with the solicitor-client relationship which underlies the privilege itself. This is true in respect of both elements of the integrity of the profession relevant to this appeal: the independence of the bar and the quality of legal services assured to each client by the Respondent's regulatory responsibilities. Section 36(1) of the *Act* must be understood in this context, as providing not only the powers of a commissioner under the *Public Inquiries Act*, R.S.N.S. 1989, c.372, but also the powers conferred by the *Act* itself, bearing in mind the particular mandate of a Complaints Investigation Committee under the *Act*, and the expressly authorized disclosures contemplated therein.

96. Second, the well-established and widely recognized institutional independence of the self-governing bar provides the client the requisite security within which the envelope of confidentiality may be extended, rather than breached. The application of the *Charter* section 8 test for reasonableness turns on this point. In virtually any other institutional context imaginable, statutory provisions which purport to extend access to privileged materials to a party beyond the control of the lawyer, without piercing the reasonably contemplated parameters of confidentiality, would be both unreasonable and indeed, virtually unimaginable. The relationship amongst client, lawyer and regulatory bar are unique in that regard.

97. Despite the arguments of the Appellant to the contrary, the regulatory bar and the Respondent in particular can be entrusted to protect and respect the controlled access to privileged materials which has been statutorily sanctioned in the public interest. In addition

to the statutory language of section 77(1), it is useful to remember that together, bench and bar have traditionally been the staunchest defenders of solicitor-client privilege. In Canada, lawyer's advocacy organizations, provincial law societies and the Federation of Law Societies in particular have been at the forefront of litigation in defence of the substantive right of privilege, either as parties or as interveners; see, *e.g., Lavallee, supra; Foster Wheeler, supra; Maranda v. Québec (Juge de la Cour du Québec)* [2003] 3 S.C.R. 193; *Brown, supra*; *Federation of Law Societies of Canada, supra*; *Law Society (British Columbia) v. Canada (Attorney General)* (2001) 207 D.L.R. (4th) 705 (B.C.S.C.); aff'd, (2002) 207 D.L.R. (4th) 736 (C.A.).

98. In keeping with this history, the Federation makes these submissions not in the single-minded pursuit of bolstered regulatory authority for its member law societies, but out of a profound appreciation for the importance of solicitor-client privilege in the administration of justice, and a deep understanding of the institutional structures on which privilege itself depends. For all the reasons canvassed in the Respondent's factum, it is respectfully submitted that the legislation should be interpreted and applied by this Honourable Court of Appeal in a manner that recognizes the interrelationship between privilege and the independent bar. The Legislature has provided the tools for effective self-governance of the profession, so that the public interest will be served. The Federation respectfully submits that the Respondent should be permitted to use those tools in the public interest, including the interests of the Appellant and all clients who seek and expect the professionalism of a duly licensed and regulated practitioner of law.

PART IV - RELIEF SOUGHT

99. On the basis of the foregoing, the Intervener requests that this appeal be dismissed, taking no position as to costs.

ALL OF WHICH is respectfully submitted this 5th day of April, 2006.

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APPENDIX A - CITATIONS

1. *Alfred Crompton Amusement Machines Ltd. v. Customs & Excise Commissioners (No. 2)*, [1972] 2 All E.R. 353 (C.A.)

2. *Anderson v. Bank of British Columbia* (1876) 2 Ch. D. 644

3. *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143

4. *B and others v. Auckland District Law Society and another*, [2004] 4 All E.R. 269

5. *Bolton v. Corporation of Liverpool*, (1833) 1 My. & K. 88; 110 E.R. 614

6. *Calley v. Richards*, (1854) 52 E.R. 406 (Rolls Ct.)

7. *Canada (Attorney General) v. Law Society of British Columbia (sub nom. Jabour v. Law Society of British Columbia)* [1982] 2 S.C.R. 307

8. *Descôteaux v. Mierzwinski* [1982] 1 S.C.R. 860

9. *Federation of Law Societies of Canada v. Canada (Attorney General)* (2002) 203 N.S.R. (2d) 53 (S.C.)

10. Finlayson, G.D., "Self-Government and the Legal Profession - Can it Continue?" (1985) 4 *Adv. Soc. J.* 11

11. *General Accident Assurance Co. v. Chrusz*, (1999) 180 D.L.R. (4th) 241 (Ont C.A.)

12. *Greene v. Law Society (British Columbia)* (2005) 40 B.C.L.R. (4th) 125 (S.C.)

13. *Greenough v. Gaskell* (1833) 1 My. & K. 98, 110 E.R. 618

14. *Interprovincial Pipe Line v. Minister of National Revenue*, (1995) 102 F.T.R. 141 (T.D.)

15. *Law Society (British Columbia) v. Canada (Attorney General)* (2001) 207 D.L.R. (4th) 705 (B.C.S.C.); aff'd, (2002) 207 D.L.R. (4th) 736 (C.A.)

16. *Law Society of Upper Canada v. Telecollect Inc.* (2001) 56 O.R. (3d) 296 (S.C.J.)

17. MacKenzie, Gavin, *Lawyers and Ethics: Professional Responsibility and Discipline*, 3rd ed. (loose leaf) (Toronto: Thomson Carswell, 2001)

18. Manes, R.D. & Silver, M.P., *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993)

19. *Maranda v. Québec (Juge de la Cour du Québec)* [2003] 3 S.C.R. 193

20. *McCullock Finney v. Barreau (Québec)* [2004] 2 S.C.R. 17

21. *Miller v. Miller*, [2002] N.J. No. 371 (Nfld C.A.)

22. Ontario, Legislative Assembly, Standing Committee on Administration of Justice, *Hansard*, No. J030 (December 7, 1998) at 1740 (Clayton Ruby), online: Legislative Assembly of Ontario. Hansard < http://www.ontla.on.ca/hansard/committee_debates/36_parl/session2/justice/j030.htm>

23. Ontario, Legislative Assembly, Standing Committee on Administration of Justice, *Hansard*, No. J031 (December 8, 1998) at 1610-1620 (Gavin MacKenzie), online: Legislative Assembly of Ontario. Hansard <http://www.ontla.on.ca/hansard/committee_debates/36_parl/session2/justice/j031.htm>

24. O'Rourke v. Darbishire, [1920] A.C. 581 (H.L.)

25. Parry-Jones v. Law Society [1968] 1 All E.R. 177 (C.A.)

26. *Pritchard v. Ontario (Human Rights Commission)* [2004] 1 S.C.R. 809

27. R v. Brown [2002] 2 S.C.R. 185

28. *R v. Cox & Railton* (1884), 14 Q.B.D. 153

29. R v. Derby Magistrates' Court , ex parte B and another [1995] 4 All E.R. 526 (HL)

30. R v. Lavallee, Rackel & Heintz [2002] 3 S.C.R. 209

31. *R v. McClure,* [2001] 1 S.C.R. 445

32. R v. Neil, [2002] 3 S.C.R. 631

33. R (on the application of Morgan Grenfell & Co Ltd) v. Special Commissioner of Income Tax, [2002] 3 All E.R. 1 (HL)

34. *R v. Shirose* [1999] 1 S.C.R. 565

35. Re Robertson Stromberg (1995), 122 D.L.R. (4^{th}) 551 (Sask. C.A.)

36. *Smith v. Jones* [1999] 1 S.C.R. 455

37. *Société d'énergie Foster Wheeler Ltée v. Société intermunicipale de gestion & d'élimination des déchets inc.* [2004] 1 S.C.R. 456

38. *Solosky v. Canada* [1979] 1 S.C.R. 821

39. *Southwark & Vauxhall Water Co. v. Quick*, (1878) 3 Q.B.D. 315 (C.A.)

APPENDIX B - STATUTES AND REGULATIONS

An Act to Amend Chapter 30 of the Revised Statutes, 1989, the Barristers and Solicitors Act, and to Amend Chapter 58 of the Revised Statutes, 1989, the Cape Breton Barristers' Society Act, S.N.S.1995-96, c. 18

Barristers and Solicitors Act, R.S.N.S. 1989, c.30

Law Society Act, R.S.O., 1990, c.L.8

Legal Profession Act, S.N.S. 2004, c.28

Public Inquiries Act, R.S.N.S. 1989, c.372