

FEDERAL COURT OF APPEAL

B E T W E E N:

THE LAW SOCIETY OF UPPER CANADA

Appellant

- and -

**MINISTER OF CITIZENSHIP AND IMMIGRATION,
THE CANADIAN SOCIETY OF IMMIGRATION CONSULTANTS AND
THE ATTORNEY GENERAL OF CANADA**

Respondents

**MEMORANDUM OF FACT AND LAW OF
THE FEDERATION OF LAW SOCIETIES OF CANADA**

1. The Intervenor, the Federation of Law Societies of Canada (the "Federation"), supports the position of the Appellant the Law Society of Upper Canada ("LSUC") that the appeal should be allowed, and this Court should declare that the *Regulations Amending the Immigration and Refugee Protection Regulations*, SOR/2004-59 (the "Regulations") are *ultra vires*. The Federation intervenes to provide the perspective of its member law societies across Canada on certain issues that arise in this case.

2. The Federation is the national coordinating body of the country's fourteen law societies, which are mandated by provincial and territorial status to regulate the country's 95,000 lawyers and Quebec's 3,500 notaries in the public interest. The Federation is a leading voice on a wide range of issues of national and international importance involving justice and regulatory matters critical to the protection of the public.

3. The Federation submits that the Regulations create irreconcilable conflicts with duties owed by lawyers and law firms, in cases where lawyers employ law clerks who act as immigration consultants. On the one hand, the Regulations require that law clerks who advise or consult with immigration clients become members of The Canadian Society of Immigration Consultants ("CSIC") and adhere to CSIC's rules and

obligations. On the other hand, law clerks who are employees of lawyers or law firms are required to work under the supervision of lawyers who must take ultimate responsibility for their employees' actions.

4. Conflicts may arise in particular where CSIC seeks to investigate law firm files. Pursuant to the Regulations, a law clerk may be required under certain circumstances to disclose file information to CSIC for its review. However, under the fundamental principle of solicitor-client privilege and/or the statutory duty of confidentiality, the law firm that employs the law clerk may be prohibited from disclosing that same file information. These conflicts threaten the independence of the bar, and are thereby contrary to the constitutional principle of the rule of law. The Federation submits that such conflicts have implications for provincially-regulated law societies across Canada.

5. While all parties agree that proper governance of immigration consultants is an important goal, the means chosen by the Respondents fall short of constitutional requirements and create significant problems. Law clerks working for lawyers should be exempted from the federal regime.

PART II: THE FACTS

6. The Federation adopts and relies upon the facts as set out in the Appellant's Memorandum. In addition, the Federation wishes to highlight the facts set out below.

The Federation of Law Societies of Canada

7. The Federation is an organization whose membership is composed of the 14 law societies in Canada, which in turn regulate approximately 95,000 lawyers across Canada, and 3,500 notaries in Quebec.¹ The Federation was created in 1926 and was then known as the Conference of Governing Bodies of the Legal Profession in Canada. The Federation became a fully self-governing body when it was incorporated under the

¹ The Law Society of British Columbia, The Law Society of Alberta, The Law Society of Saskatchewan, The Law Society of Manitoba, The Law Society of Upper Canada, The Barreau du Québec, The Chambres des notaires du Québec, The Nova Scotia Barrister's Society, The Law Society of New Brunswick, The Law Society of Prince Edward Island, The Law Society of Newfoundland, The Law Society of Yukon, The Law Society of the Northwest Territories, and The Law Society of Nunavut.

Canada Business Corporations Act on July 21, 1972. By unanimous consent of its 14 member law societies, the Federation has stated its mission with the following objectives, as follows:

- to identify and study matters of essential concern to the legal profession in Canada and to further co-operation among the governing bodies of the legal profession in Canada with a view to achieving uniformity in such matters;
- to operate as a forum for the exchange of views and information of common interest to the governing bodies of the legal profession in Canada and facilitate the governing bodies working together on matters of common concern;
- to improve the understanding of the public respecting the work of the legal profession in Canada; and
- in appropriate cases, to express the views of the governing bodies of the legal profession on national and international issues in accordance with directions of the Members of the Federation.

Federation Submissions, Exhibit 7 to the Heins Affidavit, *Appeal Book*, v. 3, Tab 7, p. 5262-63

8. The Federation intervenes in this appeal with the unanimous approval and consent of all its members.

The Creation of CSIC and the Proposed Regulations

9. In October 2002, the Minister of Citizenship and Immigration (“Minister”) created an external Advisory Committee (“Committee”) to the Minister to identify issues and provide recommendations on improving the profession of immigration consultants.

Heins Affidavit, *Appeal Book*, v. 1, Tab F, p. 46, para. 3

10. On October 8, 2003, CSIC was incorporated as a self-regulatory body for immigration consultants. The stated purpose of CSIC is to protect the consumers of immigration consulting services and ensure the competent and professional conduct of its members.

Heins Affidavit, *Appeal Book*, v. 1, Tab F, pp. 48-49, para. 6

CSIC Website as of December 23, 2004, Exhibit 3 to the Heins Affidavit, *Appeal Book*, v. 2, Tab 3, p. 223

11. On October 31, 2003, the Minister announced the creation of CSIC and the recommendations of the Committee. The Committee's recommendations resulted in proposed Regulations Amending the Immigration and Refugee Protection Regulations ("Proposed Regulations"), announced by the Minister on December 19, 2003.

Heins Affidavit, *Appeal Book*, v. 1, Tab F, pp. 49-50, paras. 7,8,9

12. CSIC is a non-profit corporation incorporated under Part II of the Canada Corporations Act, R.S.C., c. C-32. Parliament has not enacted any legislation authorizing CSIC as a self-regulatory body.

Heins Affidavit, *Appeal Book*, v. 1, Tab F, pp. 60-61, para. 21

13. CSIC is not independent from the Government or from Citizenship and Immigration Canada ("CIC"). CSIC is funded by the Government of Canada and CSIC has signed a contribution agreement with CIC, imposing certain conditions on CSIC. The contribution agreement provides, among other things, that CIC will "continue to monitor the professional standards set and implemented by CSIC in order to ensure that minimum standards are maintained. Should CSIC, at any stage, fail to fulfill its central role of consumer protection and maintaining professional standards, the government would take action to remove its recognition of CSIC members."

Heins Affidavit, *Appeal Book*, v. 1, Tab F, pp. 52-53, para. 12

14. The Proposed Regulations provided that, except in limited circumstances, only "authorized representatives" could represent, advise or consult with a person in matters of immigration for a fee. The Minister announced that any individuals who hired a representative who was not "authorized" would have their applications returned by CIC. The Proposed Regulations defined an "authorized representative" who may represent, advise or consult with a person as an immigration consultant for a fee as:

a member in good standing of a bar of a province, the Chambre des notaires du Québec or the Canadian Society of Immigration Consultants incorporated under Part II of the Canada Corporations Act on October 8, 2003.

Heins Affidavit, *Appeal Book*, v. 1, Tab F, pp. 50-51, para. 10

The Regulations and Their Application to Law Clerks Working for Lawyers

15. The Regulations came into force on April 13, 2004, following submissions from interested parties. They differ from the Proposed Regulations in that they exempt articling students (but not paralegals or law clerks working under the supervision of a lawyer) from the requirement to be a member of CSIC in order to act for an immigration applicant for a fee. The Regulations include lawyers, students-at-law and members of CSIC in the definition of “authorized representative” but they exclude other employees under a lawyer’s supervision, such as paralegals or law clerks. Therefore, paralegals or law clerks who are supervised by regulated lawyers who represent, advise and consult with immigration clients, must become members of CSIC and are subject to the regulatory scheme imposed by CSIC.

Regulations, Exhibit 13 to the Heins Affidavit, *Appeal Book*, v. 3, Tab 13, pp. 642-652

Letter from M. Heins to I. Laird dated April 13, 2004, Exhibit 12 to the Heins Affidavit, *Appeal Book*, v. 3, Tab 12, pp. 639-640

Letter from M. Heins to Minister dated April 15, 2004, Exhibit 13 to the Heins Affidavit, *Appeal Book*, v. 3, Tab 14, pp. 663-664

16. With the exception of Alberta (addressed specifically below), the legislative and regulatory frameworks of provincial law societies mandate, either explicitly or implicitly, that the professional obligations of a lawyer extend to the actions of her employees.² In each province and territory except Alberta, a lawyer’s professional obligations are explicitly extended to include the conduct of her employees. The following provision is typical of the language used by the provincial law societies:

² Law Society of British Columbia Professional Conduct Handbook, Ch. 12.

Law Society of Alberta Code of Professional Conduct, Ch. 2.

Law Society of Saskatchewan Code of Professional Conduct, Ch. 17.

Law Society of Manitoba Code of Professional Conduct, Ch. 17.

Law Society of Upper Canada Rules of Professional Conduct, Rule 5.

Quebec *Code of Ethics of Advocates*, R.Q. c.B-1, r.1, s. 1.00.02.

Law Society of New Brunswick Code of Professional Conduct, Ch. 19.

Nova Scotia Barristers’ Society Legal Ethics and Professional Conduct Handbook, Rule 19.3.

Law Society of Newfoundland Code of Professional Conduct, Ch. 17.

Canadian Bar Association Code of Professional Conduct, Ch. 17.

Note: The Canadian Bar Association Code of Professional Conduct is in use as the Code of Conduct in Prince Edward Island, the Yukon Territory, the Northwest Territories, and Nunavut.

...“A lawyer is completely responsible for all business entrusted to the lawyer. The lawyer must maintain personal and actual control and management of each of the lawyer’s offices. While tasks and functions may be delegated to staff and assistants such as students, clerks and legal assistants, the lawyer must maintain direct supervision over each non-lawyer staff member.”³

17. If a lawyer does not adequately supervise her employees, she may be subject to disciplinary proceedings for professional misconduct.

Heins Affidavit, *Appeal Book*, v. 1, Tab F, pp. 72-73, para. 36

The Decision Below

18. On the issue of potential conflicts between CSIC and provincial law societies, Justice Hughes dismissed the Appellant’s and Federation’s arguments on the basis that where issues of solicitor-client privilege arose, “CSIC and the law societies are free to make suitable arrangements such as transfer of disciplinary hearings respecting lawyers’ employees to the appropriate law society”, citing *Wilder v. Ontario (Securities Commission)*.

Reasons for Decision of Hughes J, paras. 29-30, *Appeal Book*, v. 1, Tab B, pp. 17-18

Wilder v. Ontario (Securities Commission), (2001) 53 O.R. (3d) 519 (C.A.)

PART III: ISSUES AND THE LAW

19. The Federation submits that the Regulations, in requiring law clerks who work for lawyers or law firms to become members of CSIC, create conflicts and interfere with the independence of the bar. Lawyers who employ law clerks are responsible to their provincial law societies for the conduct of the law clerks and are ultimately responsible for all files that the law clerks handle. If CSIC asserts jurisdiction over law clerks, there will potentially be conflicts between law clerks’ obligations to CSIC and the lawyer’s or law firm’s obligations to their provincial law society. Such a conflict would arise most

³ B.C. Professional Conduct Handbook, Ch. 12(1); see also Canadian Bar Association Code of Professional Conduct, Ch. 17, in use in PEI, the Yukon Territory, the Northwest Territory, and Nunavut.

obviously if CSIC sought to investigate a law firm file that was subject to solicitor-client privilege, but is not necessarily restricted to these situations.

i. Solicitor-Client Privilege is Fundamental to the Administration of Justice

20. Solicitor-client privilege is a fundamental building block of the legal system. The origins of this privilege can be traced as far back as the 16th century. Although solicitor-client privilege was originally a rule of evidence, the Supreme Court held in *Canada v. Solosky* that “[p]rivilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room.” Two years later, in *Descoteaux*, the Court held that the privilege is a substantive rule of law.

Canada v. Solosky, [1980] 1 S.C.R. 821 [*Solosky*] at pp. 9, 10 (QL)

Descoteaux v. Mierzwinski, [1982] 1 S.C.R. 860 [*Descoteaux*] at p. 11(QL)

Sopinka, Lederman, Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at §. 14.42

Berd v. Lovelace (1577), 21 E.R. 33, Cary 62

21. More recently, the Supreme Court has raised the status of solicitor-client privilege even higher, holding that it is “the highest privilege recognized by the courts” and is “fundamentally important to our judicial system.” In *R. v. McClure*, the Court held this privilege to be a principle of fundamental justice within the meaning of section 7 of the *Charter*.

Smith v. Jones, [1999] 1 S.C.R. 455 [*Smith*] at paras. 44, 45

R. v. McClure, [2001] 1 S.C.R. 445 [*McClure*] at paras. 17, 41

22. As an evidentiary rule and as a substantive right, the privilege belongs not to the lawyer but to the client. The lawyer acts as the “gatekeeper” of the privileged information, and is ethically bound to protect that information from disclosure unless the client consents to a waiver of the privilege. The information protected by the privilege is

out of reach for the state. Furthermore, solicitor-client privilege extends beyond the lawyer to her employees.

Lavallee Rackel & Heintz v. Canada (Attorney General), [2002] 3 S.C.R. 209 [*Lavallee*] at para. 24

Descoteaux, *supra* at p. 23

23. Solicitor-client privilege must be recognized as a client's "fundamental civil and legal right", critical to the functioning of the legal system and to the administration and the interests of justice in this country.

Solosky, *supra* at p. 12

ii. Any Exceptions to the Privilege Must be Well-Defined and Limited

24. While recognizing that the privilege is a fundamental civil and legal right, the Supreme Court has also recognized that no right is absolute, and that the privilege is subject to "clearly defined" and "limited" exceptions. It must yield only in certain clearly-defined circumstances and it does not involve any form of case-by-case balancing of interests. The privilege may be displaced only in rare instances of compelling public interest.

Smith, *supra* at paras. 51, 53, 74

McClure, *supra* at para. 35

25. Courts have enumerated certain situations in which the public interest compels disclosure as follows:

- to prove the innocence of an accused;
- to reveal the content of criminal communications; and/or
- to protect the safety of the public in situations of a clear and imminent risk of serious bodily harm or death to an identifiable person or persons.

Smith, *supra* at paras. 52, 55, 77

26. The limited and extraordinary nature of these exceptions further illustrates the fundamental nature of the privilege.

iii. Lawyers are Subject to the Duty of Confidentiality as Codified in Every Province and Territory in Canada

27. In addition to the common-law doctrine of solicitor-client privilege, communications between lawyers and their clients are protected by the lawyer's statutory duty of confidentiality. The Codes of Conduct applicable to notaries and advocates in Quebec, and to barristers and solicitors in all of the other provinces and territories, all incorporate confidentiality provisions designed to ensure that lawyers carry out their ethical obligations as gatekeepers of the information related to their clients.⁴

28. The Canadian Bar Association Code of Professional Conduct provides that:

The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge such information unless disclosure is expressly or impliedly authorized by the client, required by law or otherwise permitted or required by this Code.

Canadian Bar Association Code of Professional Conduct, Ch. 4.

⁴ Law Society of British Columbia Professional Conduct Handbook, Ch. 5.

Law Society of Alberta Code of Professional Conduct, Ch. 7.

Law Society of Saskatchewan Code of Professional Conduct, Ch. 4.

Law Society of Manitoba Code of Professional Conduct, Ch. 4.

Law Society of Upper Canada Rules of Professional Conduct, Rule 2.03.

Quebec Code of Ethics of Advocates, R.Q. c.B-1, r.1, s. 3.06.

Quebec Code of Ethics of Notaries, R.Q., c.N-3, r.0.2, s.35.

Law Society of New Brunswick Code of Professional Conduct, Ch. 5.

Nova Scotia Barrister's Society Legal Ethics and Professional Conduct Handbook, Rule 5.

Law Society of Newfoundland Code of Professional Conduct, Ch. 4.

Canadian Bar Association Code of Professional Conduct, Ch. 4.

Note: the Canadian Bar Association Code of Professional Conduct is also used as the Code of Conduct in Prince Edward Island, The Yukon, The Northwest Territories and Nunavut.

29. The above provision is found, with substantially the same language, in the professional conduct codes of British Columbia, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia and Newfoundland.

30. In Quebec, the Rules refer to the notion of “secrecy” rather than “confidentiality”. The Quebec Code of Ethics of Notaries provides, “Every notary is bound by professional secrecy.”

Quebec Code of Ethics of Notaries, R.Q., c.N-3, r.0.2, s.35

31. As set out above, professional responsibility for the acts of employees lies with the lawyers. The importance of confidentiality is such that students, clerks, paralegals and legal assistants employed by lawyers and law firms must not divulge information protected by the duty of confidentiality.

32. The Code of Professional Conduct of Alberta makes explicit provision for this. It provides that “[a] lawyer must take reasonable steps to ensure the maintenance of confidentiality by all persons engaged or employed by the lawyer.”

Law Society of Alberta Code of Professional Conduct, Ch. 7, Rule 4

iv. The Duty of Confidentiality and the Doctrine of Solicitor-Client Privilege in the Context of Law Society Investigations

33. Provisions in several provincial regulatory schemes qualify the privilege and the duty of confidentiality in the context of professional investigation of lawyers. Provincial statutes enabling self-regulation of lawyers provide that protected information may be disclosed in a professional investigation by the law society. However, this is more properly regarded as a statutory extension of privilege, not an exemption – the disclosure to law society investigators is deemed not to be a breach of privilege, and the investigators are themselves bound to respect the privilege.⁵ For example, the British Columbia *Legal Profession Act* provides as follows:

⁵ See e.g. *BC Legal Profession Act*, SBC 1998, c. 9, s. 88.
Alberta Legal Profession Act, R.S.A. 2000, c.L-8, s. 112.
Saskatchewan Legal Profession Act 1990, S.S. 1990-91, c.L-10.1, s. 41.

- 88 (1) A lawyer who, in accordance with this Act and the rules, provides the society with any information, files or records that are confidential, or subject to a solicitor client privilege, is deemed conclusively not to have breached any duty or obligation that would otherwise have been owed to the society or the client not to disclose the information, files or records.
- (2) ... a person who, in the course of carrying out duties under this Act, acquires information, files or records that are confidential or are subject to solicitor client privilege has the same obligation respecting the disclosure of that information as the person from whom the information, files or records were obtained.

BC Legal Profession Act, SBC 1998, c. 9, s. 88

34. The extension to the privilege created by the various pieces of provincial legislation is consistent with the requirements set out by the Supreme Court in *Smith, supra*. The extension is clearly defined in that disclosure is required only in accordance with the public interest as defined by the legislation. Further, the extension does not breach the underlying privilege. Because lawyers are self-regulated, discipline investigations into a member of a provincial law society are carried out by other members of that same law society, who are themselves bound by obligations which prevent any further disclosure of the privileged materials beyond the investigation.⁶

35. The rules of some jurisdictions expressly maintain the importance of solicitor-client privilege and confidentiality over the demands of an investigation into the conduct of a lawyer.⁷

Manitoba *Legal Profession Act*, C.C.S.M., c.L107, s. 67.

Ontario *Law Society Act*, R.S.O. 1990, c.L.8, s. 49.12.

Barreau du Quebec, An Act Respecting the, R.S.Q., c. B-1, s. 131.

Quebec *Code of Ethics of Notaries*, R.Q., c.N-3, r.0.1, s.36.

Nova Scotia Barristers Society Regulations Pursuant to *Legal Profession Act*, S.N.S. 2004, c. 28, s. 9.2.8.

The Regulations of the Law Society of Prince Edward Island, made in virtue of the *Legal Profession Act*, S.P.E.I. 1992, c. 39, s. 30.

The Rules of the Law Society of Newfoundland and Labrador, r. 9.07.

Northwest Territories *Legal Profession Act*, R.S.N.W.T. 1988, c. L-2, s. 29(3), also in force in Nunavut.

⁶ *BC Legal Profession Act*, SBC 1998, c. 9, s. 88(2).

Alberta *Legal Profession Act*, R.S.A. 2000, c.L-8, s. 112(2).

Manitoba *Legal Profession Act*, C.C.S.M., c.L107, s. 69.

Ontario *Law Society Act*, R.S.O. 1990, c.L.8, s. 49.18.

New Brunswick *Law Society Act 1996*, S.N.B. 1996, c. 89, s. 113.

Nova Scotia *Legal Profession Act*, S.N.S. 2004, s. 77.

⁷ Yukon *Legal Profession Act*, R.S.Y. 2002, c. 134, s. 31(8)

v. The CSIC Regulations and Disclosure of Confidential Information

36. The CSIC Rules of Conduct govern a Member's duty of confidentiality:

5.1 An Immigration Consultant has a duty to hold in strict confidence all information concerning the personal and business affairs of the Client acquired during the course of the professional relationship, and should not disclose such information unless disclosure is expressly or impliedly authorized by the Client, is required by law, or is otherwise permitted by the Rules...

5.4 Subject to being compelled by law or legal process, an Immigration Consultant shall preserve the Client's confidential information even after the termination of the retainer, whether or not differences have arisen between the Immigration Consultant and the Client.

37. However, in certain circumstances, CSIC may require that a CSIC Member provide information to CSIC. By-Law 13, provides:

13.1 The Society may require a Member to provide to the Society specific information about the Member's quality of service to clients, including specific information about:

the Member's "knowledge, skill or judgment";

the Member's attention to the interests of clients;

the records, systems or procedures of Member's practice; and

other aspects of the Member's practice.

CSIC By-Laws, By-Law 13.1

38. CSIC's By-Laws further provide that CSIC will notify a Member in writing of the requirement to provide information and shall send to the Member a detailed list of the information to be provided by him or her. The Member, in turn, shall provide the requested information to CSIC within 30 days of the request.

CSIC By-Laws, Exhibit B to Cross-Examination of Patrice Brunet, *Appeal Book*, v. 18, Tab 8(1), p. 4702, By-Law 13.2

CSIC By-Laws, By-Law 13.1

39. The Commentary to this Rule expressly permits CSIC to demand disclosure of “confidential information” in an investigation by CSIC into a member’s conduct:

Disclosure of confidential information may be permitted where expressly or impliedly authorized by the Client or where compelled by law or legal process. Disclosure may also be permitted where the fee or conduct of an Immigration Consultant has been called into question by the Client -- but, in such cases, disclosure may only be permitted to the extent necessary to defend against such allegations.

CSIC Rules, Rule 5 – Commentary, Tab 31, p. 8

vi. *The Regulations May Create Conflicts with Privilege and/or the Lawyer’s Duty of Confidentiality, and Thereby Intrude into Provincial Jurisdiction*

40. The requirement that law clerks employed by lawyers and law firms must become members of CSIC creates potential conflicts between the duties imposed on the employees by CSIC, through the Regulations, and the duties imposed on the lawyers by the common law and by their provincial law societies. An employee of a law firm who is also a member of CSIC could be faced with the impossible dilemma of being duty-bound to respect a client’s solicitor-client privilege and the duty of confidentiality imposed by the provincial law society, while being asked to comply with disclosure ordered by CSIC. Unlike the extensions of privilege created for disciplinary investigations in the provincial statutes, the CSIC rules are simply the directives of a federal corporation. They are not the embodiment of a legislative statement of the public interest sufficient to create an exception to solicitor-client privilege and the duty of confidentiality.

41. Moreover, the CSIC rules do not meet the standard set out by the Supreme Court in *Smith*. These rules specify that disclosure of client information will be required where, among other things, it is “otherwise permitted by the Rules.” The vague and inclusive nature of this language does not create a clearly enough defined or sufficiently limited exception to meet this standard. By establishing an ill-defined power to compel production of law firm files containing privileged information, unsupported by legislation,

and setting up potential conflicts between the immigration consultant's duties to CSIC and the law firm's duties to their clients, the Regulations intrude unnecessarily and unjustifiably into the regulation of lawyers and law firms by provincial law societies.

vii. *The Learned Judge Erred in Holding that the Possibility of CSIC Deferring to a Law Society's Investigation Resolved These Issues*

42. With respect, Justice Hughes' logic that it would be open to CSIC to "make arrangements to transfer the matter to the appropriate law society" in individual cases, does not answer the concerns set out above. While this logic might have been satisfactory in the context of *Wilder*, where the Ontario Securities Commission ("OSC") asserted jurisdiction over a limited aspect of a lawyer's conduct confined to a particular case – his representations to the OSC in the context of a particular matter before the OSC – it does not apply to save a system of regulation whereby law firms employing law clerks are required to serve two masters on an ongoing basis. Lawyers and firms are answerable to law societies for law clerks working under their supervision, while law clerks who deal with immigration matters are answerable to CSIC.

Reasons for Decision of Hughes J, paras. 29-30, *Appeal Book*, v. 1, Tab B, pp. 17-18

43. *Wilder* was recently distinguished by the Ontario Divisional Court in *Association of Professional Engineers of Ontario v. Ontario (Min. Municipal Affairs and Housing)*, a case in which professional engineers were held to be exempt from a parallel scheme established under the *Building Code*, which established a duplicate registration and qualification scheme for persons who prepared designs or conducted general reviews of buildings. *Wilder* was also held to be no answer to concerns that federal money-laundering legislation would require lawyers to breach solicitor-client confidences on an

ongoing basis, in *Federation of Law Societies of Canada v. Canada*, on the grounds that the OSC's enquiry in the former case did not purport to impose inconsistent obligations and did not interfere with the solicitor-client relationship.

Association of Professional Engineers of Ontario v. Ontario (Min. Municipal Affairs and Housing), [2007] O.J. No. 1971 (Div.Ct.), at paras. 53-60

Federation of Law Societies of Canada v. Canada (A.G.), [2002] O.J. No. 17 (S.C.J.), at para. 48

44. The approach suggested by Justice Hughes, with respect, is fraught with difficulties. It is no more than a suggestion, which CSIC is not bound to follow. It does not address situations that might arise if complaints are made to both CSIC and a law society – for example, if a person is unhappy with the law society's handling of a complaint, and files a second complaint with CSIC. It does not clearly preclude CSIC from demanding information that is subject to solicitor-client privilege, nor does it regulate the use that CSIC can make of such information. The possibility of voluntary co-operation between CSIC and law societies in regulating the conduct of law clerks does not answer the jurisdictional and practical problems that are created by the parallel schemes.

PART IV: ORDER REQUESTED

45. The Federation respectfully requests that the appeal be allowed, and that this Court declare that the Regulations are *ultra vires*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: July 12, 2007

Chris G. Paliare

Andrew K. Lokan
Counsel for Federation of Law Societies
of Canada

PART V - LIST OF AUTHORITIES

1. *Wilder v. Ontario (Securities Commission)*, (2001) 53 O.R. (3d) 519 (C.A.)
2. *Canada v. Solosky*, [1980] 1 S.C.R. 821
3. *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860
4. Sopinka, Lederman, Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999)
5. *Berd v. Lovelace* (1577), 21 E.R. 33
6. *Smith v. Jones*, [1999] 1 S.C.R. 455
7. *R. v. McClure*, [2001] 1 S.C.R. 445
8. *Lavallee Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209
9. *Association of Professional Engineers of Ontario v. Ontario (Min. Municipal Affairs and Housing)*, [2007] O.J. No. 1971 (Div.Ct)
10. *Federation of Law Societies of Canada v. Canada (A.G.)*, [2002] O.J. No. 17 (S.C.J.)

APPENDIX "A"
STATUTORY AUTHORITIES

Law Society of British Columbia Professional Conduct Handbook

CHAPTER 5
CONFIDENTIAL INFORMATION

Duty of confidentiality

1. A lawyer shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, regardless of the nature or source of the information or of the fact that others may share the knowledge, and shall not divulge any such information unless disclosure is expressly or impliedly authorized by the client, or is required by law or by a court.
2. A lawyer shall take all reasonable steps to ensure the privacy and safekeeping of a client's confidential information.
3. A lawyer shall not disclose the fact of having been consulted or retained by a person unless the nature of the matter requires such disclosure.
4. A lawyer shall preserve the client's secrets even after the termination of the retainer, whether or not differences have arisen between them.
5. A lawyer shall not use any confidential information respecting a client for the benefit of the lawyer or another person, or to the disadvantage of the client. When engaging in a business transaction with a client or former client in the limited circumstances permitted by Chapter 7, the lawyer shall not use for personal benefit any confidential information acquired in the course of acting for the client.
6. A lawyer who engages in literary work such as an autobiography or memoirs shall not disclose confidential information.
7. A lawyer shall not disclose to one client confidential information concerning or received from another client in a different matter, and shall decline employment or withdraw from a retainer which might require such disclosure.
8. A lawyer shall avoid indiscreet conversations or gossip, and shall not repeat gossip or information about a client's affairs, even though the client is not named or otherwise identified.
9. A lawyer who, while in public employment, had substantial responsibility or confidential information relating to a matter shall not, after leaving public employment, represent any other party in connection with that matter, without the consent of the lawyer's former public employer.

10. A lawyer who, while in public employment, acquired confidential government information about a person shall not, unless that person consents, represent a client other than the agency of which the lawyer was a public officer or employee, where that client's interests are adverse to that person, in a matter in which the information could be used to the material disadvantage of that person.

11. A lawyer may:

(a) with the express or implied authority of the client, disclose confidential information, and

(b) unless the client directs otherwise, disclose the client's affairs to partners, associates and articulated students and, to the extent necessary, to legal assistants, non-legal staff such as secretaries and filing clerks, and to others whose services are utilized by the lawyer.

12. A lawyer may disclose information received as a result of a solicitor-client relationship if the lawyer has reasonable grounds to believe that the disclosure is necessary to prevent a crime involving death or serious bodily harm to any person.

13. A lawyer who is required by law or by order of a court to disclose a client's affairs shall not divulge more information than is necessary.

14. A lawyer who is required, under the Criminal Code, the Income Tax Act or any other federal or provincial legislation, to produce or surrender a document or provide information which is or may be privileged shall, unless the client waives the privilege, claim a solicitor-client privilege in respect of the document.

15. A lawyer who has access to or comes into possession of a document which the lawyer has reasonable grounds to believe belongs to or is intended for an opposing party and was not intended for the lawyer to see, shall:

(a) return the document, unread and uncopied, to the party to whom it belongs, or

(b) if the lawyer reads part or all of the document before realizing that it was not intended for him or her, cease reading the document and promptly return it, uncopied, to the party to whom it belongs, advising that party:

(i) of the extent to which the lawyer is aware of the contents, and

(ii) what use the lawyer intends to make of the contents of the document.

16. A lawyer may disclose a client's confidential information for the purpose of securing the appointment of a guardian or in conjunction with other protective action taken on behalf of the client, provided:

(a) the lawyer reasonably believes the client cannot adequately instruct counsel regarding the issue of disclosure,

(b) the lawyer reasonably believes the disclosure is necessary to protect the client's interests,

(c) the disclosure is not contrary to any instructions concerning disclosure given to the lawyer by the client when the client was capable of giving such instructions, and

(d) the lawyer discloses the minimum amount of information required.

CHAPTER 12 SUPERVISION OF EMPLOYEES

1. A lawyer is completely responsible for all business entrusted to the lawyer. The lawyer must maintain personal and actual control and management of each of the lawyer's offices. While tasks and functions may be delegated to staff and assistants such as students, clerks and legal assistants, the lawyer must maintain direct supervision over each non-lawyer staff member.

2. A lawyer must ensure that all matters requiring a lawyer's professional skill and judgement are dealt with by a lawyer and that legal advice is not given by unauthorized persons, whether in the lawyer's name or otherwise.

3. Letters on the letterhead of a law firm, when signed by a person other than a practising lawyer, must indicate the status or designation of the signing person for the information of the recipient.

4. There are many tasks that can be performed by a legal assistant working under the supervision of a lawyer. It is in the interests of the profession and the public for the delivery of more efficient, comprehensive and better quality legal services that the training and employment of legal assistants be encouraged.

5. Subject to this chapter, a legal assistant may perform any task delegated and supervised by a lawyer, but the lawyer must maintain a direct relationship with the client and has full professional responsibility for the work.

5.1 A lawyer may delegate tasks or functions to a legal assistant if

(a) the training and experience of the legal assistant is appropriate to protect the interests of the client, and

(b) provision is made for the professional legal judgement of the lawyer to be exercised whenever it is required.

6. Except as permitted under the Legal Services Society Act, section 9, a lawyer must not permit a legal assistant to:

- (a) perform any function reserved to lawyers, including but not limited to
 - (i) giving legal advice,
 - (ii) giving or receiving undertakings, and
 - (iii) appearing in court or actively participating in legal proceedings on behalf of a client, except in a support role to the lawyer appearing in the proceedings,
- (b) do anything that a lawyer is not permitted to do,
- (c) act finally and without reference to the lawyer in matters involving professional legal judgement, or
- (d) be held out as a lawyer, or be identified other than as a legal assistant when communicating with clients, lawyers, public officials or with the public generally.

7. A lawyer who employs a legal assistant must ensure that the assistant is adequately trained and supervised for the tasks and functions delegated to the assistant.

8. This rule is subject to Rule 5.1. It illustrates, but does not limit, the general effect of that rule.

The following are examples of tasks and functions that legal assistants may perform with proper training and supervision:

- (a) attending to all matters of routine administration,
- (b) drafting or conducting routine correspondence,
- (c) drafting documents, including closing documents and statements of accounts,
- (d) drafting documentation and correspondence relating to corporate proceedings and corporate records, security instruments and contracts of all kinds, including closing documents and statements of account,
- (e) collecting information and drafting documents, including wills, trust instruments and pleadings,
- (f) preparing income tax, succession duty and estate tax returns and calculating such taxes and duties,
- (g) drafting statements of account, including executors' accounts,
- (h) attending to filings,
- (i) researching legal questions,
- (j) preparing memoranda,
- (k) organizing documents and preparing briefs for litigation,
- (l) conducting negotiations of claims and communicating directly to the client, provided that the lawyer reviews proposed terms before the legal assistant offers or accepts a settlement.

9. The following are examples of tasks and functions that a lawyer must attend to personally and that legal assistants must not perform. This list illustrates, but does not limit, the general effect of Rule 6:

- (a) attending on the client to advise and taking instructions on all substantive matters,
- (b) reviewing title search reports,
- (c) conducting all negotiations with third parties or their lawyers, except as permitted in Rule 8,
- (d) reviewing documents before signing,
- (e) attending on the client to review documents,
- (f) reviewing and signing the title opinion and/or reporting letter to the client following registration,
- (g) reviewing all written material prepared by the legal assistant before it leaves the lawyer's office, other than documents and correspondence relating to routine administration,
- (h) signing all correspondence except as permitted in this chapter,
- (i) attending at any hearing before the court, a registrar or an administrative tribunal or at any examination for discovery except in support of a lawyer also in attendance.

10. In Rules 10 to 12,

"purchaser" includes a lessee or person otherwise acquiring an interest in a property;

"sale" includes lease and any other form of acquisition or disposition;

"show," in relation to marketing real property for sale, includes:

- (a) attending at the property for the purpose of exhibiting it to members of the public;
- (b) providing information about the property, other than preprinted information prepared or approved by the lawyer; and
- (c) conducting an open house at the property.

11. A lawyer may employ an assistant in the marketing of real property for sale in accordance with this chapter, provided:

- (a) the assistant is employed in the office of the lawyer; and
- (b) the lawyer personally shows the property.

12. A real estate marketing assistant may:

- (a) arrange for maintenance and repairs of any property in the lawyer's care and control;
- (b) place or remove signs relating to the sale of a property;

- (c) attend at a property without showing it, in order to unlock it and let members of the public, real estate licensees or other lawyers enter; and
- (d) provide members of the public with pre-printed information about the property prepared or approved by the lawyer.

Law Society of Alberta Code of Professional Conduct

CHAPTER 2 COMPETENCE

STATEMENT OF PRINCIPLE

A lawyer has a duty to be competent and to render competent services.

RULES

1. A lawyer, to be competent, must possess the skills and attributes relevant to each matter undertaken on behalf of a client and must apply them in a manner appropriate to that matter.
2. A lawyer must not act or continue to act in any matter in which it may be reasonably foreseen that the lawyer will be unable for any reason to provide competent services.
3. A lawyer who is prevented from acting or continuing to act by Rule #2 must make reasonable efforts to assist the client in obtaining competent representation.
4. A lawyer may assign to support personnel only those tasks that they are competent to perform and must ensure that they are properly trained and supervised.
5. A lawyer must refrain from conduct that impairs the lawyer's capacity or motivation to provide competent services.

COMMENTARY ON RULE 4:

The obligation to train employees extends to ethical guidance (see, for example, Rule #4 of Chapter 7, Confidentiality).

Supervision of every employee must be meaningful and effective. In particular, if a staff member is assisting a lawyer in providing services that are legal in nature rather than clerical, the standard of supervision required is extremely high. A system for periodic evaluation of employees facilitates the monitoring of competence on an ongoing basis

CHAPTER 7 CONFIDENTIALITY

STATEMENT OF PRINCIPLE

A lawyer has a duty to keep confidential all information concerning a client's business, interests and affairs acquired in the course of the professional relationship.

RULES

1. A lawyer must not disclose any confidential information regardless of its source and whether or not it is a matter of public record.
2. A lawyer must not disclose the identity of a client nor the fact of the lawyer's representation.
3. A lawyer must preserve and keep confidential property of a client under the lawyer's control.
4. A lawyer must take reasonable steps to ensure the maintenance of confidentiality by all persons engaged or employed by the lawyer.
5. A lawyer must continue to hold a client's information in confidence despite conclusion of the matter or termination of the lawyer/client relationship.
6. A lawyer who possesses confidential information of a client or former client:
 - (a) must not use such information for the lawyer's personal benefit nor the benefit of a firm member or a related person or affiliated entity of the lawyer; and
 - (b) must not act or continue to act for another client if the lawyer would have a duty to disclose such information to that client.
7. When, in other provisions of this Code, an ethical obligation of lawyers is stated to be subject to confidentiality:
 - (a) confidential information of a client must not be disclosed to any party without the client's consent;
 - (b) a lawyer must seek the client's consent to disclosure of confidential information to the extent necessary to permit the lawyer to fulfill the ethical obligation; and
 - (c) in the event that consent is withheld, the lawyer must withdraw.
8. The foregoing rules of this chapter are subject to the following:
 - (a) A lawyer must disclose confidential information to the Law Society when required to do so by the Law Society;
 - (b) A lawyer must disclose confidential information when required to do so by law;
 - (c) A lawyer must disclose confidential information when necessary to prevent a crime likely to result in death or bodily harm, and may disclose confidential information when necessary to prevent any other crime;
 - (d) When acting for more than one party in the same matter, a lawyer must disclose to all such parties any material confidential information acquired by the lawyer in the course of the representation and relating to the matter in question;

(e) A lawyer may use or disclose confidential information of a client when expressly or impliedly authorized by the client;

(e.1) A lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer's proposed conduct;

(f) A lawyer may disclose confidential information when reasonably necessary for the lawyer to properly prosecute an action or defend a claim or allegation in a dispute with a client

9. When confidential information is disclosed by a lawyer pursuant to Rule #8, the lawyer must disclose the minimum information required to give effect to Rule #8 and no more.

Law Society of Saskatchewan Code of Professional Conduct

CHAPTER IV

CONFIDENTIAL INFORMATION

RULE

The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and shall not divulge such information unless disclosure is expressly or impliedly authorized by the client, required by law or otherwise permitted or required by this Code.

CHAPTER XVII

PRACTICE BY UNAUTHORIZED PERSONS

RULE

The lawyer should assist in preventing the unauthorized practice of law.

Commentary

...

4. Subject to general and specific restrictions next following, a legal assistant may perform any task delegated and supervised by a lawyer so long as the lawyer maintains a direct relationship with the client and assumes full professional responsibility for the work. Legal assistants shall not perform any of the duties that lawyers only may perform or do things that lawyers themselves may not do. Generally speaking, the question of what a lawyer may delegate to a legal assistant turns on the distinction between the special knowledge of the legal assistant and the professional legal judgement of the lawyer which, in the public interest, must be exercised by him or her whenever it is required.

Law Society of Manitoba Code of Professional Conduct

CHAPTER 4

CONFIDENTIAL INFORMATION

RULE

The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge such information unless disclosure is expressly or impliedly authorized by the client, required by law or otherwise permitted or required by this Code.

CHAPTER XVII

PRACTICE BY UNAUTHORIZED PERSONS

RULE

The lawyer should assist in preventing the unauthorized practice of law.

Commentary

...

4. There are many tasks that can be performed by a legal assistant working under the supervision of a lawyer. It is in the interests of the profession and the public for the delivery of more efficient, comprehensive and better quality legal services that the training and employment of legal assistants be encouraged. Subject to restrictions which may be established by the governing body, a legal assistant may perform any task delegated and supervised by a lawyer, so long as the lawyer maintains a direct relationship with the client and assumes full professional responsibility for the work.

Law Society of Upper Canada Rules of Professional Conduct

2.03 CONFIDENTIALITY

2.03 (1) A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.

2 .03 (2) When required by law or by order of a tribunal of competent jurisdiction, a lawyer shall disclose confidential information, but the lawyer shall not disclose more information than is required.

2.03 (3) Where a lawyer believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious bodily harm, including serious psychological harm that substantially interferes with health or well-being, the lawyer may disclose, pursuant to judicial order where practicable, confidential information where it is necessary to do so in order to prevent the death or harm, but shall not disclose more information than is required.

2 .03 (4) Where it is alleged that a lawyer or the lawyer's associates or employees are:

(a) guilty of a criminal offence involving a client's affairs;

(b) civilly liable with respect to a matter involving a client's affairs; or

(c) guilty of malpractice or misconduct,

a lawyer may disclose confidential information in order to defend against the allegations, but the lawyer shall not disclose more information than is required.

2.03 (5) A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but the lawyer shall not disclose more information than is required.

2.03 (6) If a lawyer engages in literary works, such as a memoir or an autobiography, the lawyer shall not disclose confidential information without the client's or former client's consent.

5.01 SUPERVISION

5.01 (1) In this rule, a non-lawyer does not include a student-at-law.

5.01 (2) A lawyer shall assume complete professional responsibility for all business entrusted to him or her and shall directly supervise staff and assistants to whom particular tasks and functions are delegated.

5.01 (3) A lawyer shall not permit a non-lawyer to

- (a) accept cases on behalf of the lawyer, except that a non-lawyer may receive instructions from established clients if the supervising lawyer is advised before any work commences;
- (b) give legal opinions;
- (c) give or accept undertakings, except with the express authorization of the supervising lawyer;
- (d) act finally without reference to the lawyer in matters involving professional legal judgment;
- (e) be held out as a lawyer;
- (f) appear in court or actively participate in formal legal proceedings on behalf of a client except as set forth above or except in a support role to the lawyer appearing in such proceedings;
- (g) be named in association with the lawyer in any pleading, written argument, or other like document submitted to a court;
- (h) be remunerated on a sliding scale related to the earnings of the lawyer, except where the non-lawyer is an employee of the lawyer;
- (i) conduct negotiations with third parties, other than routine negotiations where the client consents and the results of the negotiation are approved by the supervising lawyer before action is taken;
- (j) take instructions from clients, unless the supervising lawyer has directed the client to the non-lawyer for that purpose;
- (k) sign correspondence containing a legal opinion, but the non-lawyer who has been specifically directed to do so by a supervising lawyer may sign correspondence of a routine administrative nature, provided that the fact the person is a non-lawyer is disclosed, and the capacity in which the person signs the correspondence is indicated;
- (l) forward to a client any documents, other than routine documents, unless they have previously been reviewed by the lawyer; or
- (m) perform any of the duties that only lawyers may perform or do things that lawyers themselves may not do.

5.01 (4) A lawyer shall not permit a non-lawyer to:

- (a) provide advice to the client concerning any insurance, including title insurance, without supervision;
- (b) present insurance options or information regarding premiums to the client without supervision;
- (c) recommend one insurance product over another without supervision; and
- (d) give legal opinions regarding the insurance coverage obtained.

5.01 (5) No collection letter shall be sent out over the signature of a lawyer, unless the letter is on the lawyer's letterhead, prepared under the lawyer's supervision, and sent from the lawyer's office.

5.01 (6) In addition to the requirements of this rule and the commentaries thereunder, a lawyer in an affiliation shall not delegate to the affiliated entity or the affiliated entity's

staff any tasks in connection with the provision of legal services without obtaining the client's informed consent.

5.01 (7) When a lawyer has a personalized specially encrypted diskette to access the system for the electronic registration of title documents ("e-reg" TM), the lawyer

- (a) shall not permit others, including a non-lawyer employee, to use the lawyer's diskette, and
- (b) shall not disclose his or her personalized e-reg TM pass phrase to others.

5.01 (8) When a non-lawyer employed by a lawyer has a personalized specially encrypted diskette to access the system for the electronic registration of title documents, the lawyer shall ensure that the non-lawyer

- (a) does not permit others to use the diskette, and
- (b) does not disclose his or her personalized e-reg TM pass phrase to others.

Quebec Code of Ethics of Advocates, R.Q., c.B-1, r.1

1.00.02. An advocate shall take reasonable measures to ensure compliance with the Act respecting the Barreau du Québec (R.S.Q., c. B-1), the Professional Code and the regulations adopted thereunder by any person, other than an advocate, who cooperates with him when he engages in his professional activities or by any partnership or joint-stock company within which he engages in his professional activities.

s. 3.06.01. An advocate shall not use, for his benefit, for the benefit of the partnership or joint-stock company within which he engages in his professional activities or for the benefit of a person other than the client, confidential information obtained while he engages in his professional activities.

s. 3.06.02. An advocate shall not agree to perform professional services if doing so entails or may entail the communication or use of confidential information or documents obtained from another client without the latter's consent, unless required by law.

Quebec Code of Ethics of Notaries, R.Q., c.N-3, r.0.2

- s. 35. Every notary is bound by professional secrecy.
- s. 36. A notary may be released from professional secrecy only with the written authorization of the person concerned, or if required by law.
- s. 37. No notary shall disclose that a person has retained his services, unless required to do so by the nature of the case.
- s. 38. Every notary shall avoid indiscreet conversations concerning a client and the services rendered to him.
- s. 39. No notary shall make use of confidential information in a manner that is prejudicial to a client, or with a view to obtaining a direct or indirect benefit for himself or another person.
- s. 40. Every notary must ensure that no person for whom he is responsible in his practice discloses any confidential information to a third person.
- s. 41. No notary shall disclose any personal code or mark enabling the use of his digital signature or any other, similar means of identifying him or acting in his name.

Law Society of New Brunswick Code of Professional Conduct

CHAPTER 5

RULE

The lawyer shall hold in strict confidence all information concerning the affairs of the client except where disclosure is expressly or impliedly authorized by the client, or is required by law, or is permitted or required by this Code.

CHAPTER 19

RULE

- (a) The lawyer shall uphold the integrity of the legal profession and shall endeavour to participate in its activities .
- (b) The lawyer shall assist in preventing the unauthorized practice of law.

COMMENTARY

Supervision of employees

5. (a) The lawyer shall assume complete professional responsibility for all matters entrusted to the lawyer and shall maintain direct supervision over employees and legal assistants to whom particular tasks and 7 functions are delegated by the lawyer.

(b) The lawyer who practises alone or who operates a branch or a part time office shall ensure that all matters requiring the professional skill and judgement of the lawyer are dealt with by the lawyer (or, in the case of a branch or a part-time office, by another lawyer being a partner or an associate of the lawyer), including the approval of a fee to be charged to the client, and shall ensure that no legal advice is given by unauthorized persons under the supervision of the lawyer, whether in 8 the name of the lawyer or otherwise .

Nova Scotia Barristers' Society Legal Ethics and Professional Conduct Handbook

Chapter 5

Confidentiality

Rule

A lawyer has a duty to hold in strict confidence all information concerning the business and affairs of a client where the information is acquired by the lawyer as a result of the professional relationship with the client except where disclosure is

- (a) expressly or impliedly authorized by the client;
- (b) required by law; or
- (c) permitted or required by this Handbook.

Chapter 19

Practice by Unauthorized Persons

Rule

A lawyer has a duty to assist in preventing the unauthorized practice of law.

Commentary

Supervision of employees

19.3 A lawyer assumes complete professional responsibility for all business entrusted to that lawyer and to maintain direct supervision over staff and assistants such as students, clerks and legal assistants to whom particular tasks and functions may be delegated.

19.4 A lawyer who practises alone or operates a branch or part-time office has a duty to ensure that all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer qualified to do the work and that legal advice is not given by unauthorized persons, whether in the lawyer's name or otherwise.

19.5 Furthermore, a lawyer is to approve the amount of any fee to be charged to a client for legal work. There are many tasks that can be performed by a legal assistant working under the supervision of a lawyer

Law Society of Newfoundland Code of Professional Conduct

CHAPTER IV

CONFIDENTIAL INFORMATION

RULE

The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge such information unless disclosure is expressly or impliedly authorized by the client, required by law or otherwise permitted or required by this Code.

CHAPTER XVII

PRACTICE BY UNAUTHORIZED PERSONS

RULE

The lawyer should assist in preventing the unauthorized practice of law.

COMMENTARY

Supervision of Employees

3. The lawyer must assume complete professional responsibility for all business entrusted to the lawyer, maintaining direct supervision over staff and assistants such as students, clerks and legal assistants to whom particular tasks and functions may be delegated. The lawyer who practises alone or operates a branch or part-time office should ensure that all matters requiring a lawyer's professional skill and judgement are dealt with by a lawyer qualified to do the work and that legal advice is not given by unauthorized persons, whether in the lawyer's name or otherwise. Furthermore, the lawyer should approve the amount of any fee to be charged to a client.

Canadian Bar Association Code of Professional Conduct

CHAPTER IV

CONFIDENTIAL INFORMATION

RULE

The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge such information unless disclosure is expressly or impliedly authorized by the client, required by law or otherwise permitted or required by this Code.

CHAPTER XVII

PRACTICE BY UNAUTHORIZED PERSONS

RULE

The lawyer should assist in preventing the unauthorized practice of law.

COMMENTARY

Supervision of Employees

3. The lawyer must assume complete professional responsibility for all business entrusted to the lawyer, maintaining direct supervision over staff and assistants such as students, clerks and legal assistants to whom particular tasks and functions may be delegated. The lawyer who practises alone or operates a branch or part-time office should ensure that all matters requiring a lawyer's professional skill and judgement are dealt with by a lawyer qualified to do the work and that legal advice is not given by unauthorized persons, whether in the lawyer's name or otherwise. Furthermore, the lawyer should approve the amount of any fee to be charged to a client.

British Columbia *Legal Profession Act*, SBC 1998, c.9

s. 88 (1) A lawyer who, in accordance with this Act and the rules, provides the society with any information, files or records that are confidential, or subject to a solicitor client privilege, is deemed conclusively not to have breached any duty or obligation that would otherwise have been owed to the society or the client not to disclose the information, files or records.

(2) Despite section 14 of the *Freedom of Information and Protection of Privacy Act*, a person who, in the course of carrying out duties under this Act, acquires information, files or records that are confidential or are subject to solicitor client privilege has the same obligation respecting the disclosure of that information as the person from whom the information, files or records were obtained.

(3) A person who, during the course of an investigation, audit, inquiry or hearing under this Act, acquires information or records that are confidential or subject to solicitor client privilege must not disclose that information or those records to any person except for a purpose contemplated by this Act or the rules.

(4) A person who, during the course of an appeal under section 48 or an application under the *Judicial Review Procedure Act* respecting a matter under this Act, acquires information or records that are confidential or are subject to solicitor client privilege must not

(a) use the information other than for the purpose for which it was obtained, or

(b) disclose the information to any person.

(5) The Court of Appeal, on an appeal under section 48, and the Supreme Court, on an application under the *Judicial Review Procedure Act* respecting a matter under this Act, may exclude members of the public from the hearing of the appeal or application if the court considers the exclusion is necessary to prevent the disclosure of information, files or records that are confidential or subject to solicitor client privilege.

(6) In giving reasons for judgment on an appeal or application referred to in subsection (5), the Court of Appeal or the Supreme Court must take all reasonable precautions to avoid including in those reasons any information before the court on the appeal or application that is confidential or subject to solicitor client privilege.

(7) Despite section 14 of the *Freedom of Information and Protection of Privacy Act*, the benchers may make rules for the purpose of ensuring the non-disclosure of any confidential information or information that, but for this Act, would be subject to solicitor client privilege, and the rules may be made applicable to any person who, in the course of any proceeding under this Act, would acquire the confidential or privileged information.

(8) Section 47 (4) of the *Freedom of Information and Protection of Privacy Act* does not apply to information that, but for this Act and the production of the information to the commissioner under that Act, would be subject to solicitor client privilege.

Alberta Legal Profession Act, R.S.A. 2000, c.L-8

s. 112(1) A member may not in any proceedings under Part 3 or 4 refuse to give evidence, answer inquiries or produce or make available any records or other property on the ground of solicitor and client privilege if the evidence, inquiry, records or other property is material to the proceedings.

(2) If a member is required under subsection (1) to give evidence, answer inquiries or produce or make available any records or other property pursuant to subsection (1) and the member may claim solicitor and client privilege in respect of the evidence, answers, records or other property, the member or any other person who may claim the solicitor and client privilege may require that

- (a) all or part of any proceedings under Part 3 or 4 in which the evidence, answers, records or other property is dealt with be held in private, and
- (b) the public be refused access to the records and other property and to any other document containing the evidence or answers.

(3) If the Court of Queen's Bench or the Court of Appeal on an application or appeal under Part 3 or 4 considers it necessary to prevent the disclosure of evidence, answers, records or other property in respect of which solicitor and client privilege may be claimed, the court shall order that

- (a) all or any part of the proceedings before the court in which the evidence, answers, records or other property is dealt with be held in private, and
- (b) the public be refused access to the records or other property and to any other document containing the evidence or answers.

Saskatchewan Legal Profession Act 1990, S.S. 1990-91, c. L-10.1

s. 41(1) The chairperson of the competency and standards committee shall review each matter referred to him or her pursuant to section 40.

(1.1) Following that review, the chairperson of the competency and standards committee shall:

(a) direct that no further action be taken if he or she is of the opinion that the matter does not raise an issue of competence; or

(b) in any other case, appoint a committee to conduct an investigation, on behalf of the competency and standards committee, to review whether, in its opinion, the member is practising law in a competent manner.

(1.2) A committee appointed by the chairperson of the competency and standard committee for the purposes of clause (1.1)(b) is to consist of:

(a) any number of benchers or members that the chairperson of the competency and standards committee considers appropriate; and

(b) a chairperson, who is a member or bencher, designated by the chairperson of the competency and standards committee;

(2) The committee appointed pursuant to subsection (1.1) may, for the purposes of the investigation, require the member who is being investigated to

(a) answer any inquiries; and

(b) provide the committee with any information, files or records within the members possession or power.

(3) On completion of an investigation pursuant to subsection (1.1), the competency and standards committee may request the member who is being investigated to comply with:

(a) any restrictions or conditions that the committee may impose on the members practice of law for any period of time that the committee considers advisable; or

(b) any other requirements that the committee considers appropriate to increase the members knowledge or skill in the practice of law.

(4) On completion of an investigation pursuant to subsection (1.1), the competency and standards committee may make a report to the chairperson of the discipline committee.

(5) The report of the competency and standards committee is not to be used as evidence in any civil proceeding.

Manitoba Legal Profession Act, C.C.S.M., c. L107

s.67 For the purpose of conducting an investigation of a member under this Division, the chief executive officer, the complaints investigation committee or any person designated by either of them may request, and is entitled to obtain, any file or record regarding a client or former client of the member that is reasonably required to further the investigation, whether or not the file or record or any part of it is

- (a) subject to solicitor-client privilege; or
- (b) the subject of a charge or complaint.

s. 69(1) All complaints received or under investigation and all proceedings of the complaints investigation committee must be kept confidential.

(2) Despite subsection (1),

(a) details of the complaint, information obtained through the investigation of the complaint and records of the proceedings and decisions of the committee may be disclosed for the purpose of a hearing on a charge related to the complaint and any appeal from the decision made at that hearing;

(b) the chief executive officer may disclose to the Minister of Justice of Manitoba and the Minister of Justice of Canada, or to persons designated by either or both of them, information that the chief executive officer considers necessary for the purpose of a judicial appointment;

(c) the president or the chief executive officer, or a person designated by either of them, may disclose

(i) that a complaint about the conduct or competence of a member has been received,

(ii) that a complaint is or will be under investigation, or

(iii) where clause 68(c) applies, that restrictions have been imposed on a member's practice or that a member has been suspended from practising law, pending completion of the investigation and any disciplinary proceeding that may follow; and

(d) the president, the vice-president, the chief executive officer or the chair or vice-chair of the complaints investigation committee have a duty to disclose to a law enforcement authority any information about possible criminal activity on the part of a member that is obtained during an investigation under this Division.

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

s. 49.12 (1) A benchler, officer, employee, agent or representative of the Society shall not disclose any information that comes to his or her knowledge as a result of an audit, investigation, review, search, seizure or proceeding under this Part.

(2) Subsection (1) does not prohibit,

- (a) disclosure required in connection with the administration of this Act, the regulations, the by-laws or the rules of practice and procedure;
- (b) disclosure required in connection with a proceeding under this Act;
- (c) disclosure of information that is a matter of public record;
- (d) disclosure by a person to his or her counsel; or
- (e) disclosure with the written consent of all persons whose interests might reasonably be affected by the disclosure.

(3) A person to whom subsection (1) applies shall not be required in any proceeding, except a proceeding under this Act, to give testimony or produce any document with respect to information that the person is prohibited from disclosing under subsection (1).

s. 49.18 (1) The Commissioner and each member of his or her staff shall not disclose,

- (a) any information that comes to his or her knowledge as a result of an investigation under subsection 49.15 (2); or
- (b) any information that comes to his or her knowledge under subsection 49.15 (3) that a benchler, officer, employee, agent or representative of the Society is prohibited from disclosing under section 49.12.

(2) Subsection (1) does not prohibit,

- (a) disclosure required in connection with the administration of this Act, the regulations, the by-laws or the rules of practice and procedure;
- (b) disclosure required in connection with a proceeding under this Act;
- (c) disclosure of information that is a matter of public record;
- (d) disclosure by a person to his or her counsel; or
- (e) disclosure with the written consent of all persons whose interests might reasonably be affected by the disclosure.

(3) A person to whom subsection (1) applies shall not be required in any proceeding, except a proceeding under this Act, to give testimony or produce any document with respect to information that the person is prohibited from disclosing under subsection (1).

Barreau du Quebec, An Act Respecting The, R.S.Q., c. B-1

131. (1) An advocate must keep absolutely secret the confidences made to him by reason of his profession.

(2) Such obligation, however, shall not apply when the advocate is expressly or implicitly relieved therefrom by the person who made such confidences to him or where so ordered by law.

(3) An advocate may, in addition, communicate information that is protected by professional secrecy, in order to prevent an act of violence, including a suicide, where the advocate has reasonable cause to believe that there is an imminent danger of death or serious bodily injury to a person or an identifiable group of persons. However, the advocate may only communicate the information to a person exposed to the danger or that person's representative, and to the persons who can come to that person's aid. The advocate may only communicate such information as is necessary to achieve the purposes for which the information is communicated.

**Nova Scotia Barristers Society Regulations Pursuant to the *Legal Profession Act*,
S.N.S. 2004, c. 28**

9.2.8 Within ten days of receipt of a requirement for response or such additional time as the Executive Director may allow, the member shall respond to the complaint by providing a full answer to the complaint, which answer shall

- (a) address all matters in the complaint, unless otherwise directed by the Executive Director,
- (b) provide copies of all relevant file materials the member relies upon, and
- (c) answer additional questions and provide additional information and material that may be required by the Executive Director.

The Regulations of the Law Society of Prince Edward Island, made in virtue of the *Legal Profession Act, S.P.E.I. 1992, c. 39*

s. 30. (1) A discipline committee may at any time direct an investigation to be made by a chartered accountant or other person designated by the committee (referred to in this regulation as the "investigator") of the books, records and accounts of the member for the purpose of ascertaining and reporting whether the requirements respecting accounts have been and are being complied with.

(1.1) A discipline committee may at any time direct a practice investigation to be made by an investigator of some of all of the records and files of a member for the purpose of ascertaining and reporting whether the member is practising law in a competent manner that is consistent with the public interest.

(1.2) The investigator in section 1.1 shall be a member of the Society and shall not be a member of the discipline committee.

(2) The member shall produce for the investigator all the books, records, vouchers, papers and evidence which the investigator requires for the purposes of the investigation.

(3) The investigation, where practicable, shall be made in the office of the member whose accounts are the subject of the investigation

(4) The investigator shall report the results of the investigation to a discipline committee and

(a) if the investigator finds that the requirements have been complied with, shall file a certificate to that effect with the Secretary-Treasurer; or

(b) if the investigator finds that the requirements have not been complied with, shall specify the nature of the breaches, and where any trust account has been overdrawn, as a whole or with respect to any client, shall state at what time, for how long each time, and by what amount each time it has been overdrawn; and

(c) if a member or the member's employees or associates have, in any way, failed to comply with the investigator's request for information or records or have otherwise impeded the investigation, shall report the circumstances; and

(d) if the investigator has been unable to make or complete the investigation, shall state the reasons therefor.

(5) The investigator's report may be made the subject of disciplinary proceedings against a member and may be used in evidence in the proceedings.

(6) The Council may exercise all and any of the functions of a discipline committee under this regulation.

The Rules of the Law Society of Newfoundland and Labrador

9.07 (1) A respondent shall co-operate fully in an investigation and shall provide access to all files and other records in the custody or under the control of the respondent which are relevant to the subject of the investigation.

(2) In the course of an investigation, solicitor-client privilege shall not apply as against the society to enable the respondent or the complainant to refuse to produce any information or documentation in their possession or under their control.

(3) All information and documentation obtained, which, but for this rule, would be subject to solicitor-client privilege, shall be held in confidence and shall not be disclosed except to a person carrying out duties under the Act or the rules, the complainant in circumstances contemplated by rule 9.04(6) or otherwise as required by law.

Northwest Territories *Legal Profession Act*, R.S.N.W.T., c. L-2

s. 29. (1) It is the duty of a member or student-at-law whose conduct is inquired into to appear at an inquiry, but in the event of his or her non-attendance, the Sole Inquirer or the Committee of Inquiry may, on receiving proof of service of notice to the member or student-at-law, proceed with the inquiry in his or her absence and may, without further notice to the member or student-at-law, make a report of the findings of the inquiry or take such other action as is authorized under this Act.

(2) A witness may be examined on oath on all matters relevant to the inquiry and shall not be excused from answering any question on the ground that the answer might

- (a) tend to incriminate the witness,
- (b) subject the witness to punishment under this Part, or
- (c) tend to establish the liability of the witness
 - (i) to a civil proceeding at the instance of the Crown or of any person, or
 - (ii) to prosecution under any Act,

but the answer so given shall not be used or received against the witness in any civil proceedings or in any proceeding under any other Act.

(3) A member or student-at-law may not in any proceedings under this Part refuse to give evidence or produce any books, papers or documents on the ground of solicitor and client privilege.

(4) For the purpose of obtaining the testimony of a witness who is out of the Territories, a judge of the Supreme Court on an application *ex parte* by the Sole Inquirer or the Committee of Inquiry or the member or student-at-law whose conduct is being inquired into may direct the issuing of a commission for the obtaining of the evidence of the witness under the Rules of the Supreme Court in that behalf.

Yukon Territory *Legal Profession Act*, R.S.Y. 2002, c. 134

31(1) If the chair of the discipline committee directs that the matter concerning the member's conduct be referred to a committee of inquiry, the chair shall in accordance with the rules and this Act

- (a) convene a committee of inquiry to hear the matter; and
- (b) give reasonable notice to the member whose conduct is the subject of the inquiry of the time and place of the inquiry and of reasonable particulars of the conduct and matter to be inquired into.

(2) A committee of inquiry may at any time during a hearing amend any notice in writing given to the member being inquired into and may also inquire into any other matter concerning the conduct of the member that arises in the course of the inquiry, but in either event the committee shall declare its intention to amend the notice in writing or to investigate the new matter and shall permit the member sufficient opportunity to prepare their answer to the amendment or the new matter.

(3) The committee of inquiry shall inquire into the matter in accordance with the principles of natural justice and for that purpose may

- (a) adduce and hear evidence on its own motion;
- (b) hear evidence adduced by the society or the member;
- (c) summon and enforce the attendance of persons, other than the member whose conduct is being inquired into;
- (d) compel the testimony of witnesses, other than of the member whose conduct is being inquired into;
- (e) compel witnesses to produce documents and things relevant as evidence in the matter being inquired into, and for that purpose may have the powers and remedies of a person under section 28 conducting a preliminary investigation;
- (f) administer oaths and affirmations; and
- (g) do all other things necessarily incidental to the reasonable exercise of the powers and discharge of the duties of the committee.

(4) The attendance of witnesses before a committee of inquiry and the production of documents or other things may be enforced by a notice issued by the chair of the discipline committee requiring the witness to attend and stating the time and place at which the witness is to attend and the documents or other things the witness is required to produce.

(5) On the written request of the member whose conduct is being inquired into, the chair of the discipline committee shall without charge issue and deliver to the member any notices they need for the attendance of witnesses or the production of documents or other things.

(6) A witness who has been served with a notice to attend or a notice for the production of documents or other things under subsection (4) or (5) is entitled to the same fees as are payable to witnesses in civil proceedings in the Supreme Court.

(7) Failure to comply with any order or direction of the committee of inquiry made under subsection (3) may be dealt with by the Supreme Court, on application by the member whose conduct is being inquired into or by the chair of the discipline committee, in the same way as the Supreme Court could deal with the failure to comply with a similar order or direction in civil proceedings before it, and in relation to the production of documents or other things the Supreme Court may also make any order that it could make under section 28.

(8) Nothing in the section compels disclosure of any thing or information that is protected by solicitor-client privilege.

(9) Subject to subsection 25(12), if the chair of the discipline committee directs that the matter concerning the member's conduct be referred to a committee of inquiry and the member whose conduct is being inquired into requests that the committee of inquiry be so constituted, the chair of the discipline committee shall convene a committee of inquiry that

(a) does not include any member who resides in the Yukon; or

(b) does not include more members who reside in the Yukon than the number that the member whose conduct is being inquired into consents to.

New Brunswick Law Society Act 1996, S.N.B. 1996, c. 89

s. 112 (1) Where a member is requested or ordered to produce a document or disclose information under this Act, and the member objects on grounds that it is subject to solicitor and client privilege and the client objects to its production or disclosure, the document shall be sealed without inspection or copying and placed in the custody of the Registrar.

(2) Where a document is sealed under subsection (1), the member shall provide the Society and the Registrar with the name and address of the client who objects to disclosure.

(3) Forty-five days after being provided with the name and address of the client, the Registrar shall return the sealed document to the member unless the Society obtains

- (a) a written waiver of privilege signed by the client, or
- (b) written certification from the Executive Director of having obtained from the client an oral waiver of privilege.

(4) The Court may, upon application,

- (a) extend the time provided in subsection (3), and
- (b) where the client cannot be located, order that the sealed document be held by the Registrar on conditions as to notice or substituted service on the client that the Court considers appropriate in the circumstances.

s. 113(1) A person who, in the course of carrying out duties under this Act, becomes aware of information or a document that is confidential or is subject to solicitor and client privilege, has the same obligation respecting disclosure of that information or document as the member from whom the information or document was obtained.

(2) A member who, in accordance with this Act, provides the Society with information or a document that is confidential or subject to solicitor and client privilege shall be deemed not to have breached any duty or obligation that the member would otherwise have had to the Society or the client not to disclose the information or document.

(3) A person who, during the course of any court proceeding with respect to a matter under this Act, becomes aware of information or a document that is confidential or subject to solicitor and client privilege, shall not utilize, produce or disclose the information or document for a purpose other than that for which it was obtained.

(4) In any court proceeding with respect to a matter under this Act, the court may exclude members of the public from the hearing where the court considers the exclusion is necessary to prevent the disclosure of information or the production of a document that is confidential or is subject to solicitor and client privilege.

(5) In giving reasons for judgment in any court proceeding, the court shall take all reasonable precautions to avoid including in its reasons any information before the court that is confidential or is subject to solicitor and client privilege.

Nova Scotia Legal Profession Act, S.N.S. 2004

s. 77 (1) Any person who, in the course of carrying out duties under this Act, becomes aware of information or a document that is confidential or is subject to solicitor-client privilege, has the same obligation respecting disclosure of that information or document as the member of the Society from whom the information or document was obtained.

(2) A member of the Society who, in accordance with this Act, provides the Society with information or a document that is confidential or is subject to solicitor-client privilege is deemed not to have breached any duty or obligation that the member would otherwise have had to the client or to the Society respecting disclosure of that information or document.

(3) Any person who, during any court proceeding respecting a matter arising under this Act, becomes aware of information or a document that is confidential or is subject to solicitor-client privilege, shall not use, produce or disclose the information for a purpose other than that for which it was obtained.

(4) In any court proceeding respecting a matter arising under this Act, the court may exclude members of the public from the proceeding where the court considers that the exclusion is necessary to prevent the disclosure of information or a document that is confidential or is subject to solicitor-client privilege.

(5) In giving reasons for judgment in any court proceeding respecting a matter arising under this Act, the court shall take all reasonable precautions to avoid including in those reasons any information before the court that is confidential or is subject to solicitor-client privilege.

CSIC Rules of Professional Conduct

PART 5 CONFIDENTIALITY

5.1 An Immigration Consultant has a duty to hold in strict confidence all information concerning the personal and business affairs of the Client acquired during the course of the professional relationship, and should not disclose such information unless disclosure is expressly or impliedly authorized by the Client, is required by law, or is otherwise permitted by the Rules.

5.2 An Immigration Consultant shall take all reasonable steps to ensure the privacy and safekeeping of a Client's confidential information.

5.3 An Immigration Consultant shall not disclose the fact of having been consulted or retained by a person unless the nature of the matter requires such disclosure.

5.4 Subject to being compelled by law or legal process, an Immigration Consultant shall preserve the Client's confidential information even after the termination of the retainer, whether or not differences have arisen between the Immigration Consultant and the Client.

5.5 An Immigration Consultant should ensure that Employees and Agents maintain and preserve the Client's confidential information.

Commentary:

1. An Immigration Consultant owes a duty of confidentiality to every Client whether a casual or continuing Client. This duty survives the professional relationship and continues indefinitely even after the professional relationship has terminated, and regardless of whether there are differences between the Client and Immigration Consultant.

2. An Immigration Consultant is forbidden from ever using confidential information for his or her own benefit, for the benefit of a third party, or to the disadvantage of the Client.

3. Disclosure of confidential information may be permitted where expressly or impliedly authorized by the Client or where compelled by law or legal process. Disclosure may also be permitted where the fee or conduct of an Immigration Consultant has been called into question by the Client – but, in such cases, disclosure may only be permitted to the extent necessary to defend against such allegations.

4. An Immigration Consultant should avoid indiscreet conversations or gossip, and should not repeat gossip or information about a Client's affairs, even though the Client is not named or otherwise identified.

CSIC By-Laws

BY-LAW 13

PROFESSIONAL COMPETENCE

13.1 Requirement to Provide Information The Society may require a Member to provide to the Society specific information about the Member's quality of service to clients, including specific information about:

- (a) the Member's knowledge, skill or judgment;
- (b) the Member's attention to the interests of clients;
- (c) the records, systems or procedures of the Member's practice; and
- (d) other aspects of the Member's practice.

13.2 Notice of Requirement to Provide Information The Society shall notify a Member in writing of the requirement to provide information and shall send to the Member a detailed list of the information to be provided by him or her.

13.3 Time for Providing Information The Member shall provide to the Society the specific information required of him or her not later than thirty (30) days after the date specified in the notice of the requirement to provide information.

13.4 Extension of Time for Providing Information The Society may extend the time within which the Member shall provide to the Society the specific information required of him or her.

13.5 Request for Extension of Time A request to the Society to extend time shall be made by the Member in writing and not later than the day on which the Member is required to provide to the Society the specific information required of him or her.