

Advocacy

Canadian Bar Association advocacy in the professional and public interest



Vol. 4, 2009

Lawyers are in a unique position to see the practical impact of the law and to bring this important optic to the public discourse. Through its advocacy work, CBA members contribute an important perspective to law reform in Canada and internationally — the view of those in the trenches of the law, who know how it works on a day-to-day basis.

CBA's advocacy initiatives are also a source for practical tools that will help you everyday.

CBA brings a “rule of law” perspective to the public debate. On behalf of the legal profession as a whole or focused on a specialized area of law, CBA's advocacy work can be clustered under seven main themes:

- Conflicts of Interest
- Solicitor-client privilege
- Independence of the Bar and Judiciary
- Access to justice
- Fairness in the Justice System
- Improved Administration of Justice
- Lawyers' Professional Interests

For more information on these and other initiatives, visit www.cba.org

Conflicts of Interest

Current conflict of interest rules impose a heavy burden on lawyers, law firms, the courts and, unexpectedly, on clients. There is a growing concern that these rules are out of step with the modern practice of law. Existing conflicts rules are not protecting clients or serving the public interest as well as they might.

CBA's Task Force on Conflicts of Interest was established in March 2007 to find a more practical approach to managing conflicts for clients and the profession and to develop useful model tools and materials for lawyers. It undertook to develop a CBA consensus on changes to the rules that may be considered by the law societies and incorporated into their codes of conduct. Task Force members are from large and small law firms, in-house and government practice, the lawyer's insurance and law society sectors, and a variety of practice areas.

The Task Force undertook extensive consultations with the profession, asking:

- are loyalty requirements being interpreted appropriately,
- should presumptions of information-sharing within a law firm be rebuttable,
- should retainer letters be encouraged or required, and
- do the rules pose problematic challenges for particular areas of practice, and in rural and remote communities.

The Task Force published its report in August 2008. The focus of the work of the Task Force is the lawyer-client relationship. This Report consider how the lawyer-client relationship is established, the fundamental duties lawyers owe their clients, and the benefit of written understandings between clients and lawyers.

CBA Council adopted the Task Force recommendations and directed the Task Force and the CBA Ethics Committee to draft amendments to the Code of Professional Conduct. The Conflicts Task Force is also

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Conflicts of Interest Tool Kit

With its report, the Task Force on Conflicts of Interest released an 80-page toolkit with practical checklists and precedents to help lawyers recognize, deal with and avoid conflicting interests. The toolkit complements the in-depth legal analysis in the Task Force Report.

Please visit: www.cba.org/CBA/groups/conflicts/toolkit2.aspx

continuing to work with the Federation of Law Societies with a view to incorporating the conflicts principles adopted by CBA Council into the Federation’s new model code of professional conduct.

Solicitor-Client Privilege

Privacy Commissioner of Canada v. Blood Tribe Department of Health

In February 2008, CBA intervened at the Supreme Court of Canada in *Privacy Commissioner of Canada v. Blood Tribe Department of Health*. At issue was whether the Privacy Commissioner could compel production of documents when a claim of solicitor-client privilege is asserted during an investigation under the *Personal Information Protection and Electronic Documents Act* (PIPEDA). CBA argued that, as a general rule, express

legislation is required to abrogate solicitor-client privilege, and that PIPEDA contains no such express provision. The legal effect of permitting a regulator access to privileged information for the purpose of assessing the privilege claim is to infringe the privilege.

The Supreme Court dismissed the appeal and strongly affirmed the fundamental importance of solicitor-client privilege, consistent with the CBA intervention: “It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised.” The decision will have a wide impact on a host of administrative commissions and tribunals that routinely demand access to privileged information — without a court order — in carrying out their regulatory mandate.

Ministry of Public Safety and Security v. Criminal Lawyers’ Association

In December 2008, CBA intervened at the Supreme Court of Canada in an appeal from the Ontario Court of Appeal. At issue was whether the government is constitutionally obliged under section 2(b) of the *Charter* to legislate an abrogation of its own solicitor-client privilege in the public interest, to promote freedom of expression of members of the public. While the Ontario Information and Privacy Commissioner and the Divisional Court said no to that question, the Court of Appeal determined that the Act infringed the Charter, and extended the public interest override to allow access to privileged records.

CBA argued that government is not constitutionally required to abrogate its own solicitor-client privilege. To the contrary, the government’s solicitor-client privilege should be fostered in that it promotes the public interest by enhancing the application of the law and maintaining the rule of law over public administration.

C A N A D I A N B A R
Advocacy

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For more information on these and other initiatives, please visit www.cba.org

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Laptop Security

U.S. border security policy poses a potential threat to solicitor-client privilege. CBA PracticeLink suggests 10 steps to take to protect sensitive data when travelling across the border on business. Each comes with caveats. The most important is that there are no guarantees.

Read the guidelines at: www.cba.org/CBA/activities/pdf/guidelines-eng.pdf

Independence of the Judiciary and the Profession

Competition Bureau Study of the Professions

The Competition Bureau is looking at anti-competitive aspects of regulated professions. The Bureau wants to see the extent to which professions use restrictive practices to control entry into the profession or to control the conduct of members. Lawyers are one of five targeted groups. The Competition Bureau asked the groups to identify potential or actual restrictions on competition, including: entry, accreditation and mobility; scope of practice; business structures; fee schedules; and advertising. The Bureau published its findings and suggestions in December 2007. The report acknowledges legitimate public interests other than competition that must come into play in the regulation of the legal profession. CBA agrees. CBA's interest is in defending the independence of the legal profession, in particular self-regulation. Independence is not for the benefit of lawyers. Rather, its purpose is to protect the public, affording them independent legal advice as the foundation of a free and democratic society. The CBA task team constituted to monitor the issue is confident that clients and the public are generally well served, but notes there is always room for improvement.

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CBA PracticeLink

CBA PracticeLink is the comprehensive, award-winning, online law practice destination exclusive to CBA members. The site offers practical tools, information, tips, and ideas to help cope with the day-to-day, bread-and-butter issues of running a law practice: serving clients, marketing your practice, managing finances, using technology, balancing work and personal life, and more.

Designed with the busy, practising lawyer in mind, CBA PracticeLink helps members with the business side of law. Visitors can pick up exclusive articles and tips, interact and listen to podcasts to help their practice flourish.

For all of this and much more, visit:
www.cba.org/practicelink

CBA will continue to work the other stakeholders in the legal system to ensure that the delivery of legal services evolves to improve access to justice.

Money Laundering

Defending the privileged relationship between lawyers and their clients, CBA opposed government attempts to conscript lawyers in the fight against money laundering by reporting their clients based on any "suspicion" of money laundering. CBA intervened in a constitutional challenge of the 2001 *Proceeds of Crime Act* that included lawyers in the reporting regime. The profession was successful in having lawyers removed from the Act. The government must seek the consent of the legal profession for any regulations that would bring lawyers into the regime.

Canada is an active member of the Financial Action Task Force (an international intergovernmental body dedicated to combating money laundering) and is committed to meeting various FATF targets, most recently those concerning client identification. CBA continues to object to proposed government regulations that would require lawyers to collect client identification information for government purposes, subjecting law offices to potential compliance searches in contravention of Supreme Court of Canada guidelines. CBA will raise serious concerns about any measure that would infringe lawyers' primary duty to our clients or erode the independence of the legal profession.

Judicial Compensation

The Supreme Court of Canada has made it clear: judicial independence is a constitutional imperative. Governments must establish independent, objective and effective mechanisms to review judges' remuneration and must publicly respond to the recommendations with due diligence and dispatch. CBA has detected a pattern, both federally and provincially, of governments tending to disregard the recommendations of independent commissions on judicial compensation and benefits. While governments must balance limited financial resources, they must also respect the fair and independent process for determining judicial remuneration.

In its submission to the federal 2007 Quadrennial Commission, CBA emphasized the principles to be followed by the Commission in making its recommendations, to ensure that the best and brightest legal minds are not deterred from applying for judicial

appointments. The Commission report endorsed the CBA principles.

CBA told the Special Advisor on Federal Court Prothonotaries' Compensation that principles of judicial independence should be extended to those who, like Federal Court prothonotaries, combine court administrative functions with significant judicial decision-making responsibilities. The Special Advisor's recommendations are consistent with constitutional requirements of judicial independence.

Access to Justice

Action Committee on Access to Justice

CBA is concerned about the growing middle income gap in access to justice, with only the very poor covered by legal aid for some matters and the very rich having a chance at a fair and impartial judicial determination of their legal matters.

Some find it easy to point to high legal fees as the problem. But lawyers should not bear all the blame. The problem is systemic. CBA has joined with judges, governments, legal aid providers and others to form the national Action Committee on Access to Justice to find concrete solutions. This includes alternative ways to provide legal services (such as unbundling), ensuring every court appearance is meaningful, productive and efficient, and improving legal education so the public can use legal services efficiently and make sense of their rights and the legal process. The Chief Justice of Canada is honorary chair of the Action Committee.

Legal Aid

The CBA has lobbied for adequate legal aid services for over 20 years. In 2005, CBA launched a test case to establish a broader constitutional entitlement to civil legal aid. Naming the federal government, the BC government and the BC legal aid plan, CBA called for broad systemic constitutional recognition of a limited right to civil legal aid. This approach — acting in the public interest — recognized that an impoverished individual is unlikely to launch a Charter challenge when unfairly denied legal aid.

The courts were not receptive to the CBA's legal arguments and the Supreme Court of Canada denied leave to appeal. Still, CBA will continue to fight for improved delivery of adequate legal aid services for all

people in Canada. CBA and its Branches are pressing federal, provincial and territorial Ministers of Justice and Finance to support designated funding for civil legal aid, to ensure accountability and transparency for federal funds. CBA has also commissioned a comprehensive study into new approaches to legal aid delivery, which will be used to renew CBA's policies and actions on legal aid.

No Fault Compensation

CBA is working to reinstate fairness for victims of automobile accidents. At a time when insurance companies show unprecedented profits, some provincial laws remove accident victims' right to sue in tort, in favour of a regime that often provides inadequate benefits and rehabilitation, or caps the deductible on damages. Victims receive only part of the compensation to which they are justly entitled. When the legal system has no effective remedy, they often give up their claims to fair compensation.

CBA's Working Group on No-fault Compensation has developed a strategy to assist lawyers and their clients challenging these unjust laws. The action plan includes a campaign to show governments and the public the true social cost of "no-fault" regimes, economic research to support litigation, and coalition building. CBA gave financial assistance for litigation costs to those challenging the constitutionality of caps legislation in Alberta. The Alberta Court of Queen's Bench found that the legislation discriminated, saying that the cap was "demeaning to [the claimants] because it suggests that their pain is worth less than that of other injury sufferers... It also confirms prejudices that soft tissue injuries are generally faked or exaggerated." The case is under appeal.

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Pro Bono Mentorship Program

CBA has launched the Pro Bono Mentorship Program to encourage and assist Canadian lawyers in providing pro bono legal services to the public. The program supports lawyers currently providing (or wishing to provide) pro bono legal services, by connecting them with mentors who have experience in pro bono or in an area of law relevant to the pro bono work.

To join: www.cba.org/CBA/groups/probono/mentorship.aspx

The Working Group is preparing a toolkit entitled “Fighting No-Fault Auto Insurance” for use by CBA members. Look for it soon on CBA.ORG.

First Nations’ Specific Claims

Specific claims by First Nations address grievances about the way Canada has undertaken its obligations under historic treaties or administration of First Nations’ funds and assets. The historic process for dealing with specific claims was cumbersome, expensive and fraught with delays, some lasting for decades. CBA’s National Aboriginal Justice Section told the Senate Committee on Aboriginal Peoples studying the Specific Claims Policy in 2006 that the delays resulted in serious problems of access to justice and fairness for First Nations. CBA recommended additional resources and an independent body to process claims more expeditiously. The government listened. In 2008, CBA analyzed legislation

to institute a tribunal of judges with power to make binding decisions on certain specific claims, commending the proposal and suggesting several improvements. Several CBA suggestions were incorporated into the new law, which received Royal Assent in June 2008. CBA also supported the creation of new judicial positions to accommodate the work of the Tribunal.

Fairness in the Justice System

Immigration Matters

An efficient, fair and transparent immigration system is critical to Canada’s economy. When the system breaks down, it is imperative that prospective immigrants to Canada have independent legal representation to protect their best interests. CBA has challenged government initiatives that would permit the Minister to issue unreviewable instructions, without public input or Parliamentary oversight, to establish immigration priorities, to make language assessment mandatory (even for those educated in English- or French-speaking countries), and to allow information sharing between the government and bodies regulating lawyers and notaries without clients’ consent, to facilitate government complaints about their conduct in immigration matters.

As a result of CBA’s advocacy, mandatory language assessment was taken off the table, the government consulted with CBA and others about the first round of ministerial instructions and has committed to stakeholder consultation about future ministerial instructions. No further steps have been taken to permit "information sharing" about lawyers and notaries. CBA is committed to providing constructive assistance to government and Parliament, ensuring the immigration system works for everyone.

Privacy Act and Access to Information Act

The federal Privacy Act, enacted in 1982, has not kept pace with societal and technological developments, or with parallel legislation for the private sector, diminishing its effectiveness in protecting the private information of Canadians. One example is that posed by increased demands for sharing private information between public institutions, and even with foreign governments. CBA says governments must limit the

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Practising Ethically with New Technologies

The CBA Ethics Committee has developed guidelines for the ethical use of new information technologies.

Information technologies can save time and improve service. They benefit lawyers and their clients. The CBA Code of Professional Conduct notes that lawyers should maintain a facility with advances in technology in their areas of practice to maintain a level of competence that meets the standard reasonably expected of lawyers in similar practice circumstances.

The guidelines highlight best practices in several areas:

- confidentiality
- encryption
- privilege
- electronic storage, retention and deletion
- metadata
- security
- marketing
- accessibility
- service delivery
- intellectual property and software
- electronic legal research and information retrieval
- participation in online discussions

Read the guidelines at: www.cba.org/CBA/activities/pdf/guidelines-eng.pdf

personal information they collect to that demonstrably necessary for clear and articulated state goals, and must rigorously protect any personal information collected. CBA contributed to a Parliamentary Committee review of “critical issues” in 2008, saying a more comprehensive overhaul of the Privacy Act is required.

The CBA Privacy and Access Law Section will also review the federal *Access to Information Act*, which provides public access to information held by governments as a basic right of citizens in a democratic regime, under the premise that any limits to that right should be specific and limited and subject to independent review. The Act has not been subject to comprehensive review since it came into force in 1983. CBA will look at several issues around modernizing the legislation and its administration, beginning with a consideration of jurisdictional differences in the operation of the Act.

Security Certificates

In *Charkaoui*, CBA intervened at the Supreme Court of Canada to argue that the regime of secret trials to enforce immigration security certificates went too far. Other means could better protect the rights of those subject to the proceedings. The Supreme Court struck down the security certificate regime, saying that less intrusive alternatives developed in Canada and abroad illustrate that the government can do more to protect the individual while keeping critical information confidential.

The federal government responded with Bill C-3, which imported the special advocates regime found by the U.K. courts to be seriously flawed. CBA was there again to point out the deficiencies to Parliament, resulting in changes to the Bill. While concerns still remain about its overall fairness, the new law ensures that evidence obtained by torture will not be admitted, all special advocates will be lawyers, named persons’ preferences for special advocates will be given priority, and special advocates cannot be compelled to reveal what named persons tell them in confidence. CBA also worked with government to develop criteria for appointment of special advocates, and in particular, to ensure that special advocates are senior members of the bar with significant litigation experience.

Improved Administration of Justice

Harmonizing Pension Laws

With pension regulation in Canada inherently multi-jurisdictional, one of the main objectives of the CBA Pension and Benefits Law Section is to harmonize pension laws across Canada. Harmonization would reduce duplicative or unnecessary regulatory burdens. To be most effective, harmonization efforts of individual jurisdictions must be reciprocated throughout the country. The Canadian Association of Pension Supervisory Authorities (CAPSA) has proposed a new regulatory framework to address a number of complex issues in the administration and regulation of multi-jurisdictional pension plans. The Pensions and Benefits Law Section is analyzing the practical workability proposal.

The proposed Agreement would apply the rules of the jurisdiction where the plan is registered for matters affecting the entire plan, and the rules of the jurisdiction in which plan members are employed for matters affecting entitlements. It also addresses matters such as the allocation of assets among jurisdictions on plan wind up or asset transfer. The Pensions Section suggests ways to remove ambiguity from the proposals and notes that the proposed framework would not deal well with multi-employer pension plans with contributions fixed by applicable agreements or adequately protect against one jurisdiction “scooping” assets relating to members under its own jurisdiction.

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Law Firm Leadership Conference

The CBA has created a forum for managing partners and others aspiring to leadership positions in law firms to discuss, debate and explore current issues and challenges facing Canadian law firms. The only Canadian conference of this scope and intent, the Law Firm Leadership Conference brings together industry experts, managing partners, in-house counsel and others on issues including: marketing, compensation, recruitment, conflicts and risk management, associate retention, media relations and law firm effectiveness.

The fifth Law Firm Leadership Conference will be held in Toronto in November 2009.

Securities Regulation

In an increasingly globalized economy, the regulation of Canadian financial markets is a critical factor in the vitality of the Canadian economy. Securities regulation has been the subject of countless studies over several

decades. The federal government has undertaken to work with the provinces to create a common securities regulator.

The CBA National Business Law Section acknowledges differing regional views about the efficacy of a single securities regulator in Canada. However, if there is going to be a common regulator, members of the Section's Securities Law Committee have a practical perspective on how the law can work best. In this spirit, the Securities Law Committee offered its expertise to the Expert Panel on Securities Regulation appointed by Finance Minister Flaherty in February 2008.

The Expert Panel chose the Securities Law Committee as the only group with whom to consult on the particulars of its draft Securities Act. Committee members from across the country participated. When its report was released in January 2009, the Expert Panel acknowledged the valuable input of the CBA Securities Law Committee.

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Class Action Database

CBA launched the National Class Action Database in 2007 as a pilot project to assist lawyers, courts and the public with the challenges presented by multi-jurisdictional class actions. The database will reduce uncertainty for those presumptively included in more than one class action and subject to conflicting court judgments, for counsel about the size and composition of class membership in a given class action, and for judges on the class members are bound by their decisions. The National Class Action Database is a public repository for information about the existence and status of class actions across Canada.

Superior courts in British Columbia, Yukon, Alberta, Ontario, Newfoundland, Saskatchewan, as well as the Federal Court of Canada have issued practice directions requiring lawyers to register their class actions in the national database. Québec class actions are registered on the Superior Court website and transmitted to CBA's database. Well over 200 class actions have been filed to date.

Please visit:
www.cba.org/ClassActions/main/gate/index/

Courthouse Security

A 2007 CBA Judges' Forum CLE program on courthouse security launched a discussion about the array of security issues that arise in a country as large and diverse as Canada. These range from challenges for justice system participants working out of schools or arenas in remote locations to those in large urban centres. The Judges' Forum undertook preliminary research on current security practices in courtrooms across Canada, and asked its members for more information on their own experiences with personal security. Sitting in the full range of courts and courthouse settings, Judges' Forum members bring a unique perspective from daily personal experience. The project report will offer a compilation of the research, a summary of the personal experiences, and a checklist of best practices for judges and other justice system participants to use when approaching security challenges.

Tax Court of Canada Jurisdiction

The responsibilities of the Tax Court of Canada have gradually expanded since its creation in 1983. Its key role in the Canadian judicial system was acknowledged when the Court was granted the status of a superior court of record in 2003. But tax matters are still divided between the Tax Court and the Federal Court. For example, judicial review of decisions and actions of the

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Common List of Authorities

Together with lawyers from Justice Canada, CBA has compiled a common list of authorities for use in Federal Court immigration proceedings. The list streamlines books of authorities that lawyers must produce, saving time and paper. A Notice to Parties and the Profession indicates that only quoted passages from cases in the Common List of Authorities need be reproduced in books of authorities. The Notice and Common List of Authorities is located at:

<http://cas-ncr-nter03.cas-satj.gc.ca/>

The common authorities are available to judges in every centre where the Court conducts hearings. A companion list is currently being prepared for Aboriginal law matters.

Minister of National Revenue and the power to determine whether documents in possession of a lawyer and claimed by the Minister of National Revenue are privileged are tax matters now dealt with by Federal Court. CBA wrote to the federal Minister of Justice to advocate expanding the jurisdiction of the Tax Court to include all federal tax-related matters.

Akitsiraq Law School Program in Nunavut

CBA has encouraged Justice Canada and the Nunavut Department of Justice to support the second phase of the Akitsiraq Law School Program in Nunavut. This program, launched in 1999 in partnership with the University of Victoria, allowed Inuit students to undertake a fully-accredited law degree program in Nunavut. Eleven students graduated in 2005. Justice Canada has agreed to support the planning and preparation phase of the program. CBA commends this initiative which allows Inuit to participate more fully in the administration of justice and government in Nunavut and makes the local bar more stable and sustainable.

Professional Interests

Parental Benefits for Self-employed Lawyers

CBA recognizes the importance of “work-life” balance to Canadian lawyers. Financial reasons preclude many lawyers who own their own practice from taking extended parental leave after the birth or adoption of a child. That is why the CBA has asked the federal government to extend Employment Insurance benefits for maternity and parental leave to self-employed persons. To build the case, CBA engaged a leading statistician to estimate costs of a program. Extrapolating from the costs of including the self-employed under the Quebec Parental Insurance Plan, he found that including the self-employed under the existing EI scheme for maternity and parental benefits would likely increase beneficiaries by only 4% and costs by only 3%. The government noted CBA support when it announced its intent to extend income replacement for parental leave to more Canadian families. CBA will work with the federal government to implement the program.

The Future of Lawyers

CBA has entered into a special relationship with legal futurist Richard Susskind. Dr. Susskind, in his role as Special Advisor to the CBA, will assist CBA in introducing new and challenging ideas about the future of the legal profession to its membership.

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Succession Law Tables of Concordance

CBA's Wills, Estates and Trusts Section has assembled Succession Law Tables of Concordance. The Tables provide a quick reference about estate and succession laws in Canadian jurisdictions and links for ready access to make enquiries of court and land titles officials. They are a convenient starting point for lawyers considering estate files complicated by inter-provincial issues or performing services in neighbouring jurisdictions. They are also a handy tool for those seeking to reform and harmonize succession law in the provinces and territories.

Please visit:
www.cba.org/CBA/sections_wills/main/tables.aspx

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CBA's live online CLE programs provide professional development in a lively, interactive, accessible presentation — exclusive to CBA members. Facilitated by web conferencing technology, registrants participate in high quality presentations on a variety of topics including ‘The Business of Being a Lawyer’, ‘Complying with Privacy Laws Nationally’, ‘Update on Conflicts’ and the popular ‘Business Law Boot Camp’ series.

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Each session is recorded and made available for purchase by both members and non-members as an archived web cast.

Please visit: www.cba.org/CBA/CLE/main/