



January 15, 2002

The Honourable Martin Cauchon, P.C., M.P.  
Minister of Justice and Attorney General of Canada  
House of Commons  
Ottawa ON K1A 0A6

Dear Minister,

On behalf of the Canadian Bar Association, I am writing to extend my congratulations and to welcome you to your new portfolio. Our Association has always fostered a strong and fruitful relationship with our Ministers of Justice. We look forward to meeting regularly with you and your officials throughout the year to share the perspective of the legal profession.

We would be honoured if you would address the CBA Mid-Winter Meeting of Council, which will take place in Moncton on February 16 and 17, 2002. Our members will be keenly interested in meeting their new Minister of Justice. We would welcome providing you the opportunity to address the legal profession on your upcoming plans and priorities. I am most pleased to invite you to join me at the President's Dinner on the evening of February 15.

As you embark on this new challenge, I would like to take an opportunity to bring some CBA priorities to your attention and to **request a meeting** at your earliest convenience, to discuss a number of critical issues of mutual interest. The CBA is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

As Canada's chief legal officer, two principles should guide your work in the Justice portfolio:  
adherence to the rule of law; and  
ensuring access to justice.

A fundamental aspect of the rule of law is the protection of the relationship between clients and their solicitors. For the legal system to function adequately, clients need the protection of solicitor-client confidentiality. They need the ability to tell their solicitors all of the facts of the case, truthfully and without fear that those facts will be disclosed to others. We are concerned

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that recent legislative initiatives — most particularly legislation concerning money laundering, mail opening and terrorism — are eroding the client's right to confidentiality of this information.

In addition, our justice system needs to be accessible to all. We are very concerned that access to justice is eroding, principally because of inadequate funding of the legal aid system.

These two issues are explored below.

### **Rule of Law and Solicitor-Client Confidentiality**

The CBA does not dispute the importance of fighting organized crime and money laundering. While we certainly recognize the need to balance many interests in the development of any legislation, we remain convinced that the public interest would be best served by greater protections for solicitor-client confidences in this context, as in others. The right to confidentiality belongs, after all, to the client, not to the lawyer.

The CBA, with the Federation of Law Societies of Canada and various law societies, has challenged the constitutionality of the *Proceeds of Crime (Money Laundering) Act*, arguing that certain provisions of the legislation fail to protect solicitor-client confidentiality adequately. Superior Courts in three jurisdictions have now granted interim orders, either to alter the application of the law or hold it in abeyance pending a final determination of the case.

On November 22, I wrote to your predecessor, respectfully requesting that she apply the Superior Courts' interlocutory order across Canada, until the order, or any extension, is set aside by order of a court of competent jurisdiction. This would ensure equal effect on all Canadians and the legal counsel who serve them. We have not yet received a response to that letter. I urge you to ensure your Department's prompt attention to these matters.

We have also expressed concerns about the power of Customs officials under the *Customs Act* to open mail containing solicitor-client confidences. You agreed in your past portfolio that these officials would exercise caution in opening overseas mail weighing over 30 grams, taking into account the weight of packaging, in order to better respect the spirit of the legislation. That is an important first step.

The CBA would like to pursue improvements to the legislation along the lines of a possible notice provision. The *Competition Act* requires that notice be given before privilege is breached. This places the onus for breach on the party seeking the information rather than on the party seeking to protect the client's privilege. While this matter is not strictly in the responsibilities of the Justice portfolio, we would appreciate your continued participation, as the person who ensures government adherence to the rule of law. The outcome might be particularly beneficial in light of the *Lavallee*, *White Oppenheimer Baker*, and *Fink* appeals to the Supreme Court of Canada, dealing with searches of lawyers' offices under section 488.1 of the *Criminal Code*.

The new *Anti-Terrorism Act* will likely have a serious impact on clients' rights to legal representation and to confidentiality in the solicitor-client relationship. We are convinced that there is no good reason for this. Among other things, the *Act* potentially violates the principles of solicitor-client confidentiality by requiring disclosure of this information (e.g. section 83.1 of the *Criminal Code*) and by permitting its interception (section 273.65 of the *National Defence Act*). It also potentially criminalizes lawyers' representation of alleged terrorists and financial dealings with such clients (e.g. sections 83.18 and 83.08(1)(a) of the *Criminal Code*).

## **Legal Aid**

Improvement to legal aid continues to be an urgent priority for the CBA, as an integral part of ensuring access to justice.

We were pleased with your government's commitment last year to provide bridge funding for criminal legal aid. This will help to alleviate the situation somewhat while further study is underway. We see this as an important first step to improving access and coverage of legal aid.

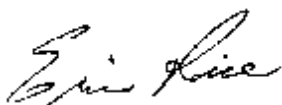
We were also pleased to hear that the provinces and territories are agreeing to participate in the legal aid needs assessment that your Department is funding. While empirical evidence is certainly important, there is an actual need right now for civil legal aid, particularly in the area of family law. We are concerned that this will remain unaddressed in the interim while research is being completed and the "business case" is developed and accepted. We understand the fiscal federalism issues that are engaged by hints of federal expansion into areas currently under shared jurisdiction. However, access to justice cannot continue to be sacrificed to jurisdictional wars.

We reiterate our offer to work with you to develop programs that might prevent some of the tragedy experienced by our family law clients and their children. We would urge you, though, to continue your efforts to bring responsibility and accountability to the civil law legal aid regime in this country.

We continue to have serious concerns about both coverage and provincial and territorial accountability for funding of civil legal aid under the CHST. We wish to continue exploring avenues to improve the situation with you.

I and my successors, Simon Potter, First Vice-President, and Bill Johnson, Q.C., Second Vice-President, would welcome the opportunity to meet with you in the very near future, to discuss these and other matters at greater length.

Yours very truly,



Eric Rice, Q.C.