OFFICE OF THE PRESIDENT
CABINET DE LA PRÉSIDENTE

November 4, 2004

M. le Bâtonnier Francis Gervais
President
Federation of Law Societies of Canada
2540 Daniel Johnson
4th floor
Laval QC H7T 2S3

Dear M. le Bâtonnier,

Re: *Protocol on Law Office Searches*

At our recent meeting, you asked for the Canadian Bar Association's comments on the Federation's draft *Protocol on Law Office Searches* (August 13, 2004 version). The CBA commends the Federation for taking the initiative to clarify parameters for law office searches, as this clarification is in both the public interest and the interests of lawyers. I have asked the National Criminal Justice Section of the Canadian Bar Association (CBA Section) to review the draft, and its members have offered some suggested improvements. The CBA Section consists of both Crown and defence counsel from across Canada.

Suggestions

1. The "Preamble" should be at the beginning of the Protocol, as it informs the remainder of the Protocol.

   The "Preamble" refers to decisions of the Supreme Court of Canada that recognized certain items as privileged and where mention is also made of the public interest in protecting solicitor-client privilege. We recommend that the "Preamble" stress the fundamental and constitutional importance of protecting solicitor-client privilege. Given the significance of the *Lavallée* case, it might be beneficial to include a citation to both a public and private report series, by adding the Supreme Court Reports citation – [2003] 3 S.C.R. 193.

2. The "Scope" portion of the *Protocol* refers to search warrants and production documents. However, the term "search warrants" is used throughout the *Protocol*. For greater clarity and certainty, the "Definition" section on page 1-2 should include the word "search", defined as either search warrants or production documents, and then the word "search" could be used throughout the *Protocol*.

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The first paragraph under the heading "Scope" seems to be restricted by points 1, 2 and 3 under the same heading. In our view, the *Protocol* should apply to all searches or seizures from a law office, and not be limited as proposed in points 1, 2 and 3. Indeed, if the *Protocol* is intended to protect privilege, the relevance of points 1, 2 and 3 is questionable, and may actually cause confusion about the *Protocol*'s scope.

The definition of "document" is critical, as it defines the circumstances in which the *Protocol* will apply. We agree that the first part of the definition should be broad. However, we are troubled by the restriction in the second part of the definition, and therefore the application of the *Protocol*, that "document" "does not include trade marks or articles of commerce or inscriptions on stone or metal or other like materials". The reference to "inscriptions on stone or metal or other like materials" is confusing, as we are unaware how materials so inscribed might guide considerations relevant to solicitor-client privilege. "Articles of commerce" is a relatively encompassing and ambiguous phrase, and may refer to items that are, in fact, privileged. For example, a contract or a statement of account might be an article of commerce but might be privileged. Finally, we question whether a trademark will ever be privileged, if trademarks are to be specifically excluded from the scope of the *Protocol*.

Having regard to the fundamental and constitutional importance of solicitor-client privilege, we are of the view that the *Protocol* should apply to all searches and seizures from law offices. The procedure set out in the *Protocol* can then determine what is, and what is not protected. The law is also clear that what is protected by privilege will often be decided on a case by case basis, having regard to the surrounding circumstances. In other words, privilege is not fully defined through reference to specific categories of information or communications. For that reason, we recommend that the definition of "document" not specifically exclude certain items.

Finally, the issues surrounding solicitor-client privilege and law office searches are continually evolving and it is difficult to foresee all circumstances in which the *Protocol* might apply or the manner in which the *Protocol* might have to be modified to reflect new circumstances. It would be prudent for the *Protocol* to explicitly state that it may be subject to revision.

3. The "Procedure" outlined in paragraph 4 could be made more precise by some small revisions.

    - In clause (e), the right to secure premises to prevent the "removal of any articles" should be qualified so that securing a law office is only permitted where there are reasonable grounds for believing that such "removal" may occur. In addition, (e) should refer to both "removal" and/or "destruction" of documents. Finally, (e) refers to the removal of any "articles". "Articles" should be replaced with "documents" to be consistent with the definitions in the *Protocol*.

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- Clause (h) states that "every effort should be made…" and clause (i) states that "the referee shall notify…". Again, for clarity and certainty, if it is intended that it is the referee that should make every effort in clause (h), we suggest that should be explicitly stated.
- Clause (i) should also specify that the client must be advised of the right to seek independent counsel.
- Finally, clause (n) should provide for voluntary relinquishing of privilege as distinguished from a situation where a court "determines" if privilege exists.

4. We note that there is no reference to an appeal provision or what might happen in the case of an appeal. The CBA Section's view is that if there is an appeal, the documents should remain sealed pending final determination of the appeal.

I hope that this is helpful, and thank you again for the opportunity to comment on the draft *Protocol*.

Yours truly,

Susan T. McGrath