THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
INFLUENCE. LEADERSHIP. PROTECTION.

Office of the President
Cabinet de la présidente

November 27, 2015

Via email: john.knubley@canada.ca; suzanne.desormeaux@justice.gc.ca

John Knubley
Deputy Minister of Industry
C.D. Howe Building
East Tower, 11th Floor
235 Queen Street
Ottawa, ON K1A 0H5

William Pentney
Deputy Minister of Justice
East Memorial Building
284 Wellington Street, Room 4121
Ottawa, ON K1A 0H8

Dear Mr. Knubley and Mr. Pentney:

Re: ***Extension of Privilege to Patent and Trade-mark Agents***

We are writing to clarify the Canadian Bar Association's position regarding recent amendments to the *Patent Act* and *Trade-marks Act* enacting a privilege over communications with clients by patent and trade-mark agents "in the same way" as solicitor-client privilege and civil law professional secrecy rules of lawyers ("C-59 amendments").

The CBA is a national association representing 36,000 jurists including Canadian lawyers, notaries, law teachers and students. Its primary objectives include improvement in the law and the administration of justice.

In our June 4, 2015 letter to then-Ministers Moore and MacKay regarding the then-proposed C-59 amendments, we requested the removal from the amended legislation of the words "in the same way as a communication that is subject to solicitor-client privilege or, in civil law, to professional secrecy of advocates and notaries" and the reference to solicitor-client privilege and the professional secrecy rules in creating the exceptions.

The concept of privilege is complex and further complicated by application of the term in diverse contexts. There are very few class privileges in Canada (other grants of privilege can be sought on a case-by-case basis). Solicitor-client privilege is the only "class privilege" that is a rule of substantive law; other class privileges – spousal privilege and informant privilege –

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc :** 613.237.0185 | **info@cba.org** | **www.cba.org**

are merely rules of evidence. The Supreme Court of Canada has confirmed that the lawyer-client relationship is unique, and that solicitor-client privilege is a broad substantive right protected by the principles underlying s. 7 of the *Charter*, applicable in all situations (not just in the litigation context) with very few exceptions. [1]

We understand that the 2014 letter from the CBA Intellectual Property Section to Industry Canada, in response to the consultation on the possible extension of privilege to patent and trade-mark agents, may have been misconstrued as expressing CBA support of the C-59 amendments. The 2014 letter explained at the outset that its intent was to contribute to the Industry Canada consultation the various perspectives within the Intellectual Property Section, and between the Intellectual Property Section and the CBA Ethics and Professional Responsibility Committee, regarding the propriety of granting privilege to patent and trade-mark agents. It did not express a consistent position and was not an expression of CBA policy.

The CBA is a vigorous defender of solicitor-client privilege in Canada; the privilege is recognized as unique by the Supreme Court of Canada and creates a zone of trust and competence that is essential to protect the public interest in the effective administration of justice.[2] But a zone of secrecy can be abused; because of this potential for abuse, it is essential that the protected communications are limited to the provision of legal advice between clients and their legal advisors who are subject to professional obligations (and disciplinary authority), including a duty to protect the administration of justice.

Consequently, it is inappropriate to describe "privileges" granted by statute to professionals who are not lawyers and hence without a duty to protect the administration of justice, as applying "in the same way" as solicitor-client privilege. For example, there are circumstances where disclosure of information is required by law, but communications with legal advisors are excepted due to the importance to the public interest of solicitor-client privilege, such as disclosures under the *Income Tax Act* to Canada Revenue Agency, under anti-money laundering legislation, or to the auditors of publicly-held companies. On balance, despite the competing interests at play, it has been determined that the significance to the administration of justice of protecting the confidence of a client's relationship with his legal advisor takes precedence.

This is not the case with patent and trade-mark agents. We appreciate and respect that Industry Canada has assessed a need to ensure the confidentiality of communications with patent and trade-mark agents in certain conditions; however that should be set out in the legislation without reference to solicitor-client privilege.

We expect it was not the intention of lawmakers to elevate the privilege extended to patent and trade-mark agents to the same level as solicitor-client privilege; in particular we note the provision (s. 16.1 *Patent Act*, s. 51.13(3) *Trade-marks Act*) goes on to state that the privilege means that "no person shall be required to disclose, or give testimony on, the communication in a civil, criminal or administrative action or proceeding." This implies an evidentiary privilege rather than a substantive right of the client. If that is correct, the words "in the same way as a communication that is subject to solicitor-client privilege or, in civil law, to

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1 *Attorney General of Canada v. Federation of Law Societies of Canada*, 2015 SCC 7; *Lavellee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink,* [2002] 3 SCR 209.

2 *R. v. McClure*, [2001] 1 SCR 445; *Tower v. M.N.R.,* [2004] 1 F.C.R. 183; *R. v. National Post,* [2010] 1 SCR 477.

professional secrecy of advocates and notaries" should not have been used because that is the likely impact of using those words and their inclusion may well invite litigation over the constitutional import of the changes.

The wording "in the same way" as solicitor-client privilege is used in legislation in other countries to create a privilege for patent and trade-mark agents. However, as solicitor-client privilege does not have the same elevated status in those jurisdictions, the use of those words does not have the same impact. It is inappropriate in the Canadian context.

Again, the CBA's position is to remove from the amended legislation the words "in the same way as a communication that is subject to solicitor-client privilege or, in civil law, to professional secrecy of advocates and notaries" and the reference to solicitor-client privilege and the professional secrecy rules in creating the exceptions. In fact the conditions are already set out in the provisions and these words are not required to provide a full definition. Only the description of the intended exceptions in new sections 16.1(3) of the *Patent Act* and s. 51.13(3) of the *Trade-marks Act* would need expansion in order to remove the reference to solicitor-client privilege in that part.

Please let us know if you have any questions or require further information. We look forward to consulting more fully on this matter in the coming months.

Yours truly,

(original signed by Janet M. Fuhrer)

Janet M. Fuhrer

cc : Denis Martel, Industry Canada; Lynn Lovett, Justice Canada
denis.martel@ic.gc.ca lynn.lovett@justice.gc.ca