Chambre des notaires

Barreau du Québec

June 5th, 2015

Via email to james.rajotte@parl.gc.ca

James Rajotte, M.P.
Chair, Standing Committee on Finance
Sixth Floor, 131 Queen Street
House of Commons
Ottawa (Ontario) K1A 0A6

Dear Sir:

Re: Review of Bill C-59, the *Economic Action Plan 2015 Act*, No. 1

The *Barreau du Québec* is a professional order of Quebec's over 25,000 lawyers and *La Chambre des notaires du Québec* is a professional order of 3 896 civil law notaries. The *Barreau du Québec* and *La Chambre des notaires du Québec* ("the Orders") appreciates the opportunity to provide its views to the Standing Committee on Finance ("the Committee") on its review of Bill C-59, the *Economic Action Plan 2015 Act,* No. 1 (the "Bill"). The Orders comments specifically on the amendments in Division 3 of Part 3 to amend the *Patent Act and the Trade-marks Act* to grant a type of statutory solicitor-client privilege to patent or trade-mark agents. The privilege will extend retroactively to communications made prior to the date the legislation comes into force, provided the communication is still confidential as of that date.

The proposed amendments have significant implications for the administration of justice, the patent and trade-mark system, the legal profession and other professions. For the reasons that follow, the Orders are very concerned about the amendments and believes they are an unnecessary and an unwarranted extension of solicitor-client privilege.

<u>The Nature of Solicitor-Client Privilege – Required to protect the public in receiving appropriate legal advice</u>

Solicitor-client privilege protects against the disclosure of communications related to legal advice between a client and his or her lawyer or notary, or their substance, being compelled in an action or proceeding. The privilege applies not only in proceedings but operates to prevent regulatory and law enforcement agencies from compelling production of documents that are privileged. Privilege is considered an exception to the principle of full disclosure of evidence and is not created lightly or expansively construed as is impairs the search for the truth.

Solicitor-client privilege is a class privilege meaning that it is as close to absolute as possible and is insensitive to the facts of any case or need for disclosure in pursuit of the truth. It is central to our system of justice in the public interest, so much so that the Supreme Court of Canada has acknowledged solicitor-client privilege as a constitutionally protected right.[1]

Canada's intellectual property regime generally seeks to balance innovator and creators' private property rights with the public's access to intellectual property. It would be inappropriate to develop an entirely new solicitor-client class privilege for intellectual property agents because the basis for solicitor-client privilege and the role of intellectual property agents in fostering private property rights are fundamentally different. While there may be a desire to protect the confidentiality of communications between agents and clients, these communications are not *required* to be privileged because they are not communications between a lawyer or notary and client related to legal advice.

Lack of a Need for Patent and Trade-Mark Agent Privilege

In the Order's view, there is no public policy rationale for granting solicitor-client privilege to the communications between patent or trade-mark agents and their clients, no evidence that privilege plays a role in the selection of a patent and trade-mark agent, lawyer or non-lawyer and, as Industry Canada's November 2013 discussion paper noted, "…little evidence of an overarching harm that needs to be remedied". Moreover, privilege accorded to non-lawyer agents in other countries should not be a relevant or persuasive factor in determining that privilege be granted to patent and trade-mark agents in Canada, as the international community is aware of the differences between the laws and practice and adapts itself accordingly.

The Risks to Extending Privilege

Applying class privilege to Canada's intellectual property regime, as the Bill currently contemplates, would be overbroad and create problems. This appears to have been recognized by Industry Canada in its November 2013 discussion paper when it noted that "when IP rights are granted they are meant to be for the public good", and that "The privilege that is being requested must be weighed against the public harm that may be created if information is withheld that would have otherwise resulted in the revocation of the right."

The proposed amendments also risk setting a precedent that would have unintended consequences. Class privileges have been historically rejected for many relationships that have social utility, such as priest and penitent, doctor and patient, accountant and taxpayer, reporter and sources and immigration consultants and their clients. Extending privilege to patent and trade-mark agents will make it difficult to determine a public policy basis not to extend privilege to other groups, especially for those who seek to protect economic or commercial rights.

Moreover, the amendments will have an impact at the provincial level. The regulation of professional relationships is generally a matter of provincial jurisdiction, and pressure from other groups would be placed on provincial legislatures to implement similar changes.

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[1] Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink, [2002] 3 SCR 209, 2002 SCC 61 (CanLII), <http://canlii.ca/t/51r>

Incomplete Consultation – Additional Study Required

The Orders understands that Industry Canada intended to complete consultations related to patent and trade-mark agent privilege this year, but that this apparently did not occur and a final report was never published. Further study is required given that some of Canada's largest lawyer groups and regulatory bodies, including the Orders, did not have an opportunity to provide their position or opinions on the issue of privilege, discuss issues patent and trade-mark agents believe are frustrating their competitive position and discuss what, if any, form of confidentiality protection might be appropriate or required to address the concerns expressed by patent and trade-mark agents.

Summary

To maintain the meaning and value of privilege, its focus must remain on the purpose for which it was created, which is to safeguard our justice system. Any discussion of extending the privilege beyond the lawyer or notary and client relationship must recognize the policy basis for the privilege doctrine and the important function it serves in the administration of justice.

The Orders are concerned that the current situation does not demonstrate any public harm that warrants such a privilege and that a new class privilege based on solicitor-client privilege is proposed without recognizing the unique policy rationale for this privilege.

Request to the Committee

The Orders recommends that the proposed amendments to the *Patent Act* and *Trade-marks Act* in Division 3 of Part 3 of the Bill related to the granting of solicitor-client privilege to patent and trade-mark agents be removed from the Bill and referred for further study. A comprehensive consultation process should resume that will ensure the inclusion of all stakeholders and other groups directly impacted by these proposals.

We thank the Committee for the opportunity to provide comments on the Bill. We would be pleased to discuss the issues raised in this letter with you further, and answer any questions.

Yours truly,

Le président de la Chambre
des notaires du Québec,

Gérard Guay

Gérard Guay

Le bâtonnier du Québec,

Bernard Synnott

Bernard Synnott

GG/BS/am