



THE CANADIAN  
BAR ASSOCIATION  
L'ASSOCIATION DU  
BARREAU CANADIEN

INFLUENCE. LEADERSHIP. PROTECTION.

Office of the President  
Cabinet de la présidente

June 4, 2015

Via email: [minister.industry@ic.gc.ca](mailto:minister.industry@ic.gc.ca); [mcu@justice.gc.ca](mailto:mcu@justice.gc.ca)

The Honourable James Moore, P.C., M.P.  
Minister of Industry  
Industry Canada  
C.D. Howe Building  
235 Queen Street  
Ottawa, ON K1A 0H5

The Honourable Peter MacKay, P.C., Q.C., M.P.  
Minister of Justice and Attorney General of Canada  
284 Wellington Street  
Ottawa, ON K1A 0H8

Dear Minister Moore and Minister MacKay:

**Re: Bill C-59 – Proposed Amendments to create Patent and Trade-mark Agent Privilege**

I am writing on behalf of the Canadian Bar Association to express concern about the proposed legislative amendments to the *Patent Act* and *Trade-marks Act* (in Bill C-59, Part 3, Division 3, ss. 54 and 66) creating a privilege for communications between patent and trade-mark agents and their clients that meet certain conditions.

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.

While the proposed amendments do not suggest that patent and trade-mark agents provide legal services, the preamble to the amendments state that the newly created privilege will apply “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”. This wording may imply, perhaps unintentionally, that the privilege being extended is a substantive right (rather than mere rule of evidence) with the quasi-constitutional status bestowed by the Supreme Court of Canada on confidential communications between lawyers and their clients in connection with the provision of legal services.

The CBA provided its input to Industry Canada on the idea of extending privilege to agents in 2004 and again in 2014 (the latter with the input of the CBA Ethics and Professional Responsibility Committee).<sup>1</sup> However, there continues to be ongoing discussion about the correct approach. In 2014, we urged Industry Canada to undertake consultations with the provincial and territorial law societies, and to provide adequate time for a meaningful response.

Consultation is needed with key stakeholders affected by these amendments, particularly to assess their impact on the administration of justice. Solicitor-client privilege is afforded a special status, in part because of the professional responsibility obligations imposed on lawyers, including the duty to facilitate the effective administration of justice in the public interest. Patent and trade-mark agents owe no such duty. While an evidentiary rule regarding confidential communications between agents and their clients may or may not be warranted, an extension of solicitor-client privilege is not an appropriate way to accomplish this goal.

The CBA recommends that these proposed amendments be removed from Bill C-59 to allow for additional study of the language used to create the privilege and the impact of that privilege on the administration of justice and the Canadian public. In this regard, we support the recent submissions on this matter of the Federation of Law Societies of Canada and the Law Society of Upper Canada to the Senate and House of Commons Finance Committees.

We would be pleased to discuss this matter further and to offer more extensive input on the proposed amendments to the *Patent Act* and *Trade-marks Act* should the opportunity be provided.

Yours truly,

*(original letter signed by Michele H. Hollins)*

Michele H. Hollins, Q.C.

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<sup>1</sup> [Privilege Protection and Self-Regulation for Patent and Trade-mark Agents \(2004\);](#)  
[Patent and Trade-mark Agent-Client Privilege \(2014\)](#)