



The Law Society of  
Upper Canada

Barreau  
du Haut-Canada

June 13, 2016

Via Email: [denis.martel@canada.ca](mailto:denis.martel@canada.ca)

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Dear Mr. Martel:

Further to the May 24, 2016 letter to Jeff Hirsch, the Federation of Law Societies of Canada President, he has referred this correspondence to the Law Society of Upper Canada as a member of the Federation.

We welcome the opportunity as a law society to comment on the consultation paper on the regulatory framework and the draft code of conduct, and propose to do so independently of the Federation. However, we request more time to provide meaningful comment.

The issues raised by the consultation paper are of particular concern to the Law Society of Upper Canada as the largest Canadian regulator of lawyers. It is important that the issues raised in the consultation paper reflect the realities of Canadian intellectual property practice. Many Canadian intellectual property lawyers are also patent or trade mark agents. Patent and trade mark agents are partners with lawyers in multi-disciplinary partnerships. Patent and trade mark agents are employed in law firms. Patent and trade mark agents are employed with lawyers in in-house law departments. Care must be taken to ensure that conduct regulation of patent and trade mark agents and of lawyers is thoughtfully coordinated.

Given the recent grant of a statutory privilege to certain communications between patent and trade mark agents and their clients, it is crucial that patent and trade mark agents be professionally accountable to a regulator that has the capacity consider communications subject to that privilege. The Law Society fulfills that role for lawyers who are charged with a statutory duty to maintain and advance the cause of justice and the rule of law. It is clear that care must be taken to ensure that effective conduct regulation of lawyers, patent agents and trade mark agents in light of the new statutory privilege and common law solicitor-client privilege. This is of particular significance given the many decisions in which the Supreme Court of Canada has held that solicitor-client privilege (and professional secrecy) must "remain as close to absolute as possible"<sup>1</sup>.

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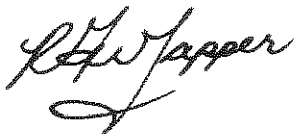
<sup>1</sup> *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20  
*Canada (National Revenue) v. Thompson*, 2016 SCC 21

With respect to the proposed code, the deadline of June 13 to respond makes it impossible for us to offer substantive comment on the code. Our preliminary review of the proposed code has at least raised the question of whether it provides the right kind of guidance and is sufficient for its purpose. As a regulator with extensive experience with professional conduct codes, it is clear to us that the proposed code has not been subject to the robust examination required for a new conduct code. It is not sufficient simply to substantially adopt a model code or selected parts of a model code applicable to the legal profession. Among other things, the risk is that the proposed code may confuse patent and trade mark agents (and lawyers with whom they work) in their practices. That said, in our view, having the proposed code in place for June 23 (the in force date of the legislation), which we understand is the desired goal, should not create unmanageable issues, as long as the proposed code is understood to be an interim measure that can (and will) quickly and easily be revised.

With respect to the regulatory framework, we propose to comment from the perspective of a long-standing and experienced regulator of licensees who are currently entrusted with the responsibility to protect solicitor and client privilege. As such, a regulatory framework that is contemplated for patent and trade mark agents who have been granted this responsibility in respect of a new statutory privilege is of high interest to us. As the Law Society and its companion organizations in other provinces already regulate lawyers who are also patent and trade mark agents, the concept of separate additional professional regulation of these "lawyer agents" raises a number of crucial questions. The regulation of "non-lawyer agents" who practice as partners or employees of lawyers raises further issues as does the regulation of lawyers and agents who work together for corporate employers. Given the importance of these and other issues, the deadline of July 29 to respond is unrealistic for the purpose of substantive, meaningful comment.

We are requesting an extension of the deadline to respond on both facets of the request for comment to August 31. We request that you correspondent directly with us, rather than indirectly through the Federation, and look forward to hearing from you.

Yours truly,

A handwritten signature in black ink, appearing to read "Robert G.W. Lapper". The signature is fluid and cursive, with a large initial "R" and a stylized "L".

Robert G.W. Lapper, Q.C.  
Chief Executive Officer

cc: Jeff Hirsch, President, Federation of Law Societies of Canada