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*This is the draft English version of a letter sent in French to the Honourable Maxime Bernier, Minister of Industry, June 8, 2006.*

Dear Minister:

As you may know, the Intellectual Property Institute of Canada (IPIC), is the professional association of patent agents, trade-mark agents and lawyers practicing in all areas of intellectual property law. Our membership totals 1,600 individuals, consisting of practitioners in firms of all sizes, sole practitioners, in-house corporate intellectual property professionals, government personnel, and academics. Virtually all lawyers in Canada who concentrate their practice in intellectual property are members of IPIC, an association celebrating its 80<sup>th</sup> anniversary this year.

Our members' clients include virtually all Canadian businesses, universities, and other institutions that have an interest in intellectual property (e.g. patent, trade-marks, copyright, and industrial designs) in Canada or elsewhere, and also foreign companies who hold intellectual property rights in Canada.

We have received a copy of the letter dated May 16, 2006 from the Federation of Law Societies of Canada ("the Federation"). We are both surprised and disappointed with the Federation's position, and also their characterization of events regarding the consultation process on the proposed legislation for the regulation of patent and trade-mark agents.

We will be presenting to you shortly the result of many years of work, consultations, research and discussions in the form of a proposal for a new regulatory framework for patent and trade-mark agents. This work follows recommendations made in 1999 by Gavin MacKenzie, an expert in the regulation of professionals who is now Treasurer (as the president is called) of the Law Society of Upper Canada. We firmly believe that this legislation:

- (i) will strengthen Canada's IP regime and the rights of innovators in this country,
- (ii) puts Canada's IP regime in line with those of many other developed countries and
- (iii) fits perfectly in an economic strategy based on innovation and commercialization as well as your Government's goals for smart and effective government.

Meanwhile, we are pleased that the Federation's letter gives us an opportunity to set out the rationale for the protection of confidential client communications with agents engaged in the protection of intellectual property rights in Canada. This key component of the proposed legislation provides for client-agent communications to be protected from discovery, ensuring that Canadian and other intellectual property ("IP") owners maintain confidentiality of valuable competitive information requirement for the assessment and protection of IP rights in Canada and elsewhere.

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As you know, patent agents and trade-mark agents are registered by Industry Canada's Canadian Intellectual Property Office (CIPO). While many registered patent or trade-mark agents are also lawyers, many are not. In fact, throughout most of the world, patent and trade-mark agents are recognized as a separate profession. In Canada, many of the leading IP practitioners are agents, not lawyers.

Under current law, confidential communications between a client and solicitor are treated as "privileged" and cannot be produced in any discovery process. However, confidential communications between clients and agents are not subject to that same protection in Canada. This is the case for non-lawyer agents, and also possibly for lawyers acting in the capacity as an agent. This is despite the fact that the confidentiality of inventions is of critical concern to anyone involved in the protection of intellectual property. That confidentiality is engrained in patent systems worldwide. This is also despite the fact that such communications between clients and their agents are treated as confidential, and subject to protection from discovery, in many other jurisdictions. And, finally, this is despite the fact that in many offices, lawyer agents and non-lawyer agents work side-by-side, often working for the same clients, on the same files. In short, the interests of inventors and patentees are put at risk because of the failure of Canada to protect this type of communication.

While the concept of protection of solicitor client communications is a fundamental element of our common and civil law traditions, it is equally important to recognize the protection of client confidentiality within the framework of IP protection. The fact that countries such as the United Kingdom, France, Australia and New Zealand, all with legal traditions similar to those in Canada, have granted protection to client communications made to agents for the purpose of seeking IP protection is ample evidence that it is not contrary to fundamental legal principles that such protection be granted. Instead, it is sound legal and economic policy. (See the attached list of countries with special protection for client-agent communications.)

IPIC has openly and widely consulted on this issue. Our members have received regular updates on our progress. We have sought, and received, positive support from Canadian companies, international companies, industry associations, Chambers of Commerce, universities, law firms, lawyers and agents (see the attached list of letters of support).

We have also actively sought the views of provincial law societies, starting at least as early as April, 2002, when our Past President met with then Treasurer of the LSUC. In the summer of 2002, IPIC wrote directly to each Law Society and the Chambres des notaires, as well as industry groups, companies and law firms, briefing them on the proposals, and asking for their support. No responses were received from any of the provincial law societies, and as far as we are aware, they have never consulted lawyers specifically engaged in the practice of IP law. It bears repeating that the issue of protection of client confidential communications is widely supported by law firms engaged in the protection of intellectual property.

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As part of the consultation process on the proposed College legislation, a meeting was held in May, 2004 at the Industry Canada offices, attended by IPIC senior officers, former presidents and its executive director, various government officials, representatives of the Federation, and representatives from industry and universities. After receiving a draft report on the meeting in November, 2004, we sought to reach out to the Federation to address their concerns, and reach a compromise that will best protect Canadian inventive activity, and ensure Canadian rights are protected in a manner similar to similar client communications in other countries. Several meetings have been held with the LSUC and representatives of the Federation since then. In October, 2005, at one of these meetings, it was indicated that the Federation would set up a working group to work with IPIC on the issues of protection of confidential communications and discipline of lawyer agents. Since then, despite further meetings, letters and telephone calls, we have not been able to meet this working group.

You can thus understand our concern, frustration, and surprise at the Federation's letter of May 16, 2006, which is an inaccurate account of the consultation process.

In the meantime, the issue of protection of confidential client communications continues to be one that is extremely relevant in intellectual property litigation. As the frequent publicity of patent litigation, the importance of patents in the protection of innovation and economic activity, and the enormous stakes in IP ownership all show, it is critical to take all reasonable steps to protect inventive activity in Canada. Both historically and currently, patent and trade-mark agents, many of whom are not also lawyers, have played a large and significant role in helping Canadians secure and protect their IP rights. Which is why IPIC will soon submit to you a detailed proposal that protects the public interest.

We believe that enough time has been spent talking about the issues and that the questions raised in Federation's letter have already been answered. The time has come to do something about it. We do not want to find our clients in a situation where their rights are compromised simply by virtue of their selection of professionals to assist them.

Yours very truly,

Cynthia Rowden  
President

c.c.: Malcolm Heins, Federation of Law Societies of Canada