



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN

June 19, 2014

Via email: mcu@justice.gc.ca; steven.blaney@parl.gc.ca

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

The Honourable Steven Blaney, P.C., M.P.
Minister of Public Safety and Emergency Preparedness
269 Laurier Avenue West
Ottawa, ON K1A 0P8

Dear Minister MacKay and Minister Blaney:

Re: Solicitor-Client Privilege at the Canada-US Border

I am writing to seek your support to strike a working group to define the issue of solicitor-client privilege claims at the Canada-US border and establish an official government policy on the matter.

The Canadian Bar Association (CBA) is a national association representing 37,500 jurists, including lawyers, Quebec notaries, law teachers and students across Canada. The CBA's primary objectives include improvement in the law and in the administration of justice.

CBA is a staunch supporter of solicitor-client privilege and has advocated for the government to adopt a policy to recognize claims of solicitor-client privilege at the border over documents and electronic documents.

Canada currently does not have a defined policy for searches at the Canadian border that involve information protected by solicitor-client privilege. The US Department of Homeland Security issued policy directives in 2009 detailing what constitutes a lawful search and the process governing devices that are reviewed and detained at the border.

Section 99 of the *Customs Act* grants Canada Border Services Agency (CBSA) officers broad powers to examine goods imported into Canada, and "goods" are defined in section 2(1) of the Act to include any document in any form. CBSA does not have a policy addressing claims of solicitor-client privilege over documents and electronic records on computers, smartphones or other Personal Digital Assistants (PDA). This may present confusion and difficulty for people travelling

outside of Canada with electronic documents on their computers, smartphones and PDAs and documents subject to solicitor-client privilege.

Canada should address this issue without delay and provide a uniquely Canadian approach consistent with Canada's legal and constitutional protections of solicitor-client privilege.

In Canada, solicitor-client privilege is a pillar of our legal system, providing clients with confidence in those who represent them. The privilege has been consistently upheld at the Supreme Court of Canada¹ and has been described as paramount in ensuring public confidence in the administration of justice. Solicitor-client privilege is essential to protect against voluntary or compelled disclosure by one's lawyer absent the client's consent or court order.

We would welcome an opportunity to work with your officials to develop a comprehensive policy on searches at the border that involve information protected by solicitor-client privilege. A working group with representatives from CBA, the Department of Justice and the CBSA could work together to ensure the comprehensiveness and cohesiveness of a policy.

Yours truly,

(original signed by Noah Arshinoff for Cyndee Todgham-Cherniak)

Cyndee Todgham-Cherniak
Chair, Commodity Tax, Customs and Trade Law Section

¹ See, for example, *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 SCR 574. The SCC stated that: "Solicitor-Client Privilege is fundamental to the proper functioning of our legal system. Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible".