



BY EMAIL

May 21, 2019

The Honourable Ralph Goodale
Minister of Public Safety
House of Commons
Ottawa, Ontario
Canada
K1A 0A6

Re: Border searches of electronic devices and the preservation of solicitor-client privilege

Dear Minister Goodale,

I write further to our previous correspondence regarding the ongoing concerns of the Federation of Law Societies of Canada (“Federation”) about inadequate protection for solicitor-client privileged information when the electronic devices of legal counsel are searched at the Canadian border. As we indicated in our correspondence of April 20, 2018 (attached), the existing policy for requesting the passwords for and searching the electronic devices of travellers entering Canada does not provide clear guidance on how Border Services Officers are to respond to a claim that a device contains information protected by solicitor-client privilege.

While we appreciate the assurance in your response dated June 20, 2018 to our earlier letter that Border Services Officers “are sensitized to the importance of solicitor-client privilege at several points during their training” recent media reports suggest the protection of privilege at the border continues to be an issue. I note that only last month, a lawyer returning to Canada had his mobile phone and laptop seized by the Canadian Border Services Agency (“CBSA”) after he refused to provide border agents with the passwords to access these devices on the grounds they contained information protected by solicitor-client privilege.

As you are aware, the Federation is the national coordinating body of Canada’s 14 law societies, which are mandated by provincial and territorial statutes to regulate the country’s 125,000 lawyers, Quebec’s 3,800 notaries and Ontario’s 10,500 licensed paralegals in the public interest. Communicating the views of the governing bodies of the legal profession, the Federation is a leading voice on national issues critical to safeguarding the public’s right to an independent legal profession, including the protection of solicitor-client privilege.

The Federation’s concerns revolve around the CBSA’s implementation of its policy under the *Customs Act* relating to its officers’ examination of electronic devices. As you are aware, CBSA officers are permitted, under the policy, to request passwords to electronic devices when a number of indicators that *Customs Act* contraventions may be found on the digital device or media are present. Our concern is that this policy and/or its implementation fail to adequately

address circumstances when a claim of solicitor-client privilege is asserted over the device or media.

In your letter dated June 20, 2018, you acknowledge the CBSA's commitment to balancing an individual's right to privacy and the safety and security of Canadians, citing safeguards and compliance under the *Privacy Act* and the *Customs Act*. However, solicitor-client privilege is a constitutionally-protected right, meaning the issue is more than one of statutory compliance. As the Supreme Court has confirmed on many occasions, solicitor-client privilege must be as close to absolute as possible to ensure that clients communicate openly and confidently with their legal counsel.

While you have confirmed that the CBSA enforcement policy currently outlines procedures on handling documents where solicitor-client privilege has been claimed, experiences of legal counsel at the border, including the recent incident referenced above, continue to raise questions about the treatment of electronic devices containing privileged information. The Federation remains concerned that despite the fact that some policy consideration has been given to privilege, gaps in policy and/or training appear to remain. This presents considerable uncertainty for members of the legal profession when crossing borders.

We would welcome the opportunity to discuss these matters in person with you or your department officials, including any further policy or other developments respecting the fundamental right of solicitor-client privilege.

Yours sincerely,



Ross Earnshaw
President