



# Frequently asked questions: College of Patent Agents and Trademark Agents

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## ▼ Why is the Government establishing a College of Patent Agents and Trade-mark Agents?

Patent and trademark agents play an essential role in helping firms obtain formal intellectual property rights, yet the profession lacks a modern governance structure (in contrast to other trusted professions —e.g. lawyers, engineers, doctors). Implementing a modern regulatory framework will ensure that businesses can trust the advice they receive from these important professionals. Ensuring the integrity of the profession has recently become more essential, as communication with IP agents is now protected by statutory privilege in the same way as solicitor-client advice. This privilege could be abused without adequate oversight.

While there is no evidence suggesting a large problem with agent conduct, the current complaints and disciplinary process is less than transparent with significant gaps. Currently, agents are regulated by the Canadian Intellectual Property Office, with the Commissioner of

Patents having limited authority to discipline patent agents for gross misconduct but no clear process for exercising this authority. There is no equivalent authority for trademark agents.

▼ Why did you decide to establish an independent regulator?

The creation of an independent regulator is responsive to stakeholder input and will guarantee professional regulation in the public interest. The College model avoids conflict of interest with both the government and the Canadian Intellectual Property Office (as the administrator of the IP system). The legislation also includes measures to ensure independence from professional organizations that represent the agent community (such as the Intellectual Property Institute of Canada).

▼ How are intellectual property agents regulated in other jurisdictions?

Internationally, there is no single approach to regulate patent and trademark agents. Approaches range from government-regulated in the US to various mixed models in Australia/New Zealand & Japan, to an independent regulator in the UK. All these models, in addition to recent changes in Canada for provincially regulated professions, indicate the importance of well-structured bodies to ensure proper independent oversight, ability for the government to intervene if necessary, and proper representation of the public interest by having a majority representation of lay members.

▼ What are the benefits and risks involved in establishing an independent regulator?

The creation of an independent regulator is responsive to stakeholder input and will increase public trust in the profession. The system features several checks and balances that will build trust in both the regulator and the system as a whole. Some risk has been identified around proposed provisions allowing investigators access to privileged documents when conducting disciplinary investigations (i.e., “piercing privilege”). The Act places a number of safeguards regarding the access and handling of privileged information, to ensure that it is only used to enable disciplinary oversight. Importantly, courts have recognized that solicitor-client privilege can be pierced to enable disciplinary oversight.

▼ Will the College be able to access solicitor-client privileged information?

Yes. As with all other legal regulators, in order to effectively regulate patent and trademark agents, many of whom are also lawyers, the College may require access to both agent privileged information and solicitor-client privileged information. This will ensure that lawyer agents and non-lawyer agents are held to the same high standard of conduct. However, access will be subject to strict safeguards to ensure that the information can only be used for the purpose of regulating agents.

▼ Why are you providing the authority for the College to access to solicitor-client privileged information (i.e., pierce privilege)?

Without the ability to pierce solicitor-client privilege, the regulator would not be able to fully regulate lawyer-agents or agents working in a law firm. Measures will be in place to ensure appropriate handling

and safeguarding of privileged information and to ensure that access to privileged information is strictly controlled. The legislation draws upon similar safeguards and process used by provincial law societies to safeguard privileged information in the investigation of its members.

▼ How will the government ensure that privileged information is protected?

The Act places strict safeguards on the use of privileged information:

- Privileged information can only be used for the purpose of regulating agents
- Disclosing privileged information to the College will not be considered a waiver of the privilege, and the privilege will be preserved for other purposes
- The Act places strict obligations on employees and directors of the college, preventing them from disclosing privileged information
- The Act further clarifies that the government cannot use its oversight authority to access privileged information
- There is a strict process of court oversight to access and contest access to solicitor-client privileged information

▼ Are you concerned about dual regulation?

It is not uncommon for professionals to be regulated by more than one regulator (e.g., doctor-lawyers, engineer-lawyers). In recognition of the potential for overlap, the legislation ensures minimal regulatory conflict for lawyers who may also be agents. In addition, the College's

investigation committee is authorized to refer a complaint to another body that has the statutory duty to regulate a profession. Further, care is being taken to ensure the code of conduct aligns as close as possible to codes regulating the legal profession to minimize regulatory overlap.

#### ▼ When will the Code of Conduct be established?

The initial code of conduct will be established in Ministerial regulation. Once published in the Canada Gazette, stakeholders will have the opportunity to provide comments. Any subsequent amendments will be undertaken by the College, with Ministerial approval.

Consultations on a code of conduct were undertaken in 2016. The code that was consulted on was based on the Intellectual Property Institute of Canada's draft code of conduct, with sections from the Federation of Law Societies of Canada Model Code of Professional Conduct.

The code of conduct was modified following consultations to take into account comments received, specifically changes were made to limit where possible any conflict with codes regulating the legal profession. Stakeholders will have an opportunity to provide further input during the regulatory process.

#### ▼ Why is ministerial oversight of the code of conduct necessary?

Codes of conduct have the potential to be used in an anti-competitive manner, such as by imposing barriers to entry into the profession. This has been recognized by the Competition Bureau. In light of this concern, the College has been given the authority to regulate conduct

and Ministerial oversight is intended to safeguard the public interest in maintaining a competitive marketplace for the services of intellectual property agents.

▼ When will the College be operational?

The exact timing will be dependent on the College. We estimate a transition period between 1-2 years before the College is operating at full capacity. During this time, a transitional Board of Directors will be in place.

▼ Why has the government retained the authority to set entry requirements for the agent profession?

In most self-regulated professions in Canada, measures are in place (e.g., provincial fairness commissioners) to ensure that entrance exams do not act as an anti-competitive barrier to entry, with the potential to inflate the cost of services. As these oversight mechanisms do not exist at the federal level, the Minister was granted regulation making authority to set entry requirements to provide a check on potential anti-competitive impacts.

The current agent exam pass rate has been noted by some commentators as an indication of barriers to entry into the profession. The 2016 overall pass rate was 12% (3% for first time writers). This is significantly lower than international comparators of 48% (US) and 45% (EU). During consultations, a majority of stakeholders agreed that the exam process requires modernization.

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