

**College of Patent Agents and Trademark Agents/  
Le Collège des agents de brevets et des agents de marques de commerce**

Board of Directors Meeting  
June 8, 2021, 2:00 ET

**Minutes**

Present: Tom Conway, Chair, Jeff Astle, Karima Bawa, Ruth McHugh, Doug Thompson, Sean Walker, CFO, Darrel Pink, CEO/Recording Secretary.

Call to Order

The Chair called the meeting to order at 2:00 ET.

Agenda

The meeting was to address the continuing challenges faced by the College in moving towards operations.

Conflicts

No conflicts were declared.

Discussion

The Board had received reports from the CEO on the challenges is developing the College's by-laws. It became apparent through this process there is limited latitude in how the College can operate and whether it can become the modern, risk-based regulator the Board has intended and that Directors were assured was the Government's intentions when they were recruited to serve. The Department of Justice, which must approve the by-laws under the *Statutory Instruments Act*, takes a very strict and literal approach to drafting. Therefore, the discretion of the Registrar to address issues based on broad public interest considerations has been limited by the need to identify in the by-laws the specific factors to be considered at each step of the Registrar's decision-making process. This is especially true in the Registration provisions.

In the Complaints and Discipline area, Justice was unwilling to accept there could be included in the by-laws an early resolution process, because it was not specifically mentioned in the Act. The Board had seen correspondence between the CEO and senior ISED officials articulating the importance of this issue to the College. Eventually Justice drafters acknowledged the authority for the Board to direct the Registrar to do certain things, such as attempt to resolve complaints, and they agreed to include provisions the College had drafted.

The Board shared the CEO's frustration with

- the slow pace of the work and the resulting limited time available for Board deliberation on the by-laws,
- the limited understanding of key participants,
- the lack of control by the CEO for the work of others because Justice supports its client ISED though the College is the one needing to develop its independent operations, and
- the lack of direct involvement by the College in creating 'its' Regulations, that will continue to thwart or limit the ability of the College to develop into the regulator the Directors and the CEO had been engaged to establish.

The Board reviewed several the issues causing continuing concern. Though the College is designed to be an independent regulator, it is now clear the legislation itself will limit the ability to do many things and the requirement to meet many Federal government requirements (e.g., Privacy Act, Access to Information, Bilingualism, Library & Archives Canada) will increase the costs for the College. That is compounded by the already identified deficiencies in the Act such as the lack of statutory immunity, the absence of provisions relating the normal authority of a corporate Board and the rigid provisions regarding 'complaints', which leaves no room for addressing matters of conduct that are identified as complaints, without involving the Investigations Committee.

#### Immunity

The Board remains concerned about the level of risk being assumed by individual Directors. This is compounded by its appreciation of the lack of flexibility in the Act and regulations and thus the strictures imposed on the College. For example, the Act allows no delegation by the Registrar, thus the structure being established requires all decisions to be made by a single person and thus there are risks as the College employs staff to ensure these requirements can be met and still operate effectively.

The Board has requested besides the insurance in place for the College, there be an indemnity agreement in place for directors. The CEO will also provide the Board with access to a subject matter expert to review the structures put in place to ensure the risks are understood and properly mitigated.

#### Possible Departmental Interference

There has yet to be any discussions about future Board appointments and how they will be done. The Board is concerned the power of appointment of most of the Board may limit or compromise the College's independence, if a Minister should use the power of appointment to exercise control over the College. This will be addressed with the Minister's Office after coming-into-force. It is a significant risk to the College.

#### Finances

The time to establish the College has been far longer than expected. More of the loan has been used than expected – about \$900,000 by the time operations begin. The Board will need to appoint an auditor and it recognizes the situation will present a going concern risk. That will be flagged in the College's financial statements. Even with fees being paid in mid-2021, the Board

recognizes the College will have little financial flexibility which will limit its capacity to establish reserves. That is compounded by the costs associated with compliance with Federal requirements, which could not be anticipated before now.

#### Regulatory risks

The College's limited information about the profession coupled with limits on what it can collect, and the narrow scope of Registrar's authority will increase risks that systemic issues may go unaddressed. The limited information gathering results from the by-laws that stipulate a narrow range of factors and information the Registrar can use when considering various types of applications, such as a change in class of licence. The example of the limited scope to address known concerns when an agent moves from an inactive to an active licence was described to the Board.

#### Foreign Agents

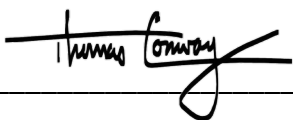
Government's original regulations were prepared without college input. The limits of Cabinet confidentiality hampered the process. The Board has heard from the profession about concerns relating to reciprocity with the USPTO and knows ISED determined to make changes regarding its approach to Foreign Agents. These changes were made without the College's direct involvement and have resulted in requirements for the College it was not prepared for and did not include in its original design of its IT infrastructure. The fact the College has no authority over 'Foreign Practitioners'(FPs) [formerly foreign agents] is not a desirable regulatory approach. There are risks from the new environment for FPs. Had the College been able to influence the approach, a different outcome may have resulted.

#### By-laws

The Board has been briefed by the CEO on the issues and timelines around the College's by-laws. Their concern is there will not be adequate time for the Board to properly fulfill its proper role as an independent body. Until the by-laws are received from the Department of Justice drafters, the full extent of this issue cannot be ascertained. It is a significant issue that must be considered by the Board when it receives documents for approval.

Even though the Board has significant concerns, it remains committed to meeting its commitment to have the College become operational. Individual Directors will then can determine what continuing role they wish to have in CPATA.

Approved June 22, 2021.



Thomas Conway

