

Board Policy No. 9 –

The Public Interest Policy and CPATA’s Decision-Making

2022-11-12

NAME OF POLICY	The Public Interest and CPATA’s Decision-Making		
APPLICABLE SECTIONS OF THE ACT, BY-LAWS AND REGULATIONS and/or PURPOSE	CPATA Act, Regulations and By-laws		
RESPONSIBILITY	CEO		
APPROVED BY	EFFECTIVE	REVIEWED	REVISED
Board of Directors	Date	Date	Date

1. Purpose

CPATA is the independent, public-interest regulator of Patent and Trademark Agents in Canada. The purpose of the College is to regulate patent agents and trademark agents ‘in the public interest’, in order to ‘enhance the public’s ability to secure the rights provided for under the Patent Act and Trademarks Act.’¹

There is no definition of ‘the public interest’ in the Act, Regulations or By-laws, so this Policy is intended to describe how CPATA views its responsibilities under the Act and CPATA’s [Regulatory Objectives](#).

CPATA’s Regulatory Objectives state:

- To advance its role as a risk-focused, modern public interest regulator, the College adopts as its Regulatory Objectives that it will strive to protect and promote **the public interest** in patent and trademark services.

¹ S. 6 of the CPATA Act

Through the statement of purpose in the Act and its primary Regulatory Objective, CPATA has determined protection and promotion of the public interest will drive all decisions made and activities undertaken by its Board, Committees, the Registrar and staff.

This policy is to assist and guide the Board, Committees, the Registrar, and staff to make public interest the primary consideration in decision making and to demonstrate how that occurs through transparency, consistency, relevant considerations, and a principled approach to all regulatory and other decision making.

In his recent review of the [Governance of the Law Society of British Columbia](#), Harry Cayton succinctly stated the challenge for professional regulators in addressing the public interest.

I recognize that the leadership of the Law Society is mindful of its task of ‘Upholding and protecting the public interest in the administration of justice’. The public interest is notoriously difficult to define: we might better say ‘the publics’ interests’, there being many different publics with varied interests at different times and in different circumstances. The Society in a way recognizes this, variously, on its website, subtitled the phrase Protecting the Public Interest as, ‘supporting BC lawyers in the practice of law’ and ‘regulating BC lawyers’, ‘preserving the rights and freedoms of all persons’ and ‘setting standards for professional responsibility and competence of BC lawyers. Interestingly it does not include consulting the public in its interests in legal services. In discussion with Benchers, observation of meetings and reading of Society policy papers I have struggled to find explicit arguments articulated as to why policies that affect the way lawyers go about their business are necessarily in the public interest. Of course, they may be and, in some matters, such as prevention of money-laundering, it is self-evident that they are but there has been no discussion in any meeting I have observed as to why a particular policy is in the public interest, merely an assertion that it is.

2. Public Interest as a key foundational principle

Considerations of the publics’ interests lie at the heart of CPATA’s mandate under the Act (s.6) and throughout the Regulatory Objectives, Standards and Principles. The public interest, contrasted with the interests of licensees, must be the primary consideration in decision-making at all levels. CPATA exists to protect the public interest in the regulation of patent agents and trademark agents².

The publics’ interests drive how CPATA operates and governs itself. Principles of accountability, consistency, openness and accessibility are foundational. When decisions are

² The interests of licensees are a focus of the main membership association, the Intellectual Property Institute of Canada

made by the Board, the Registrar or a committee, the public (and licensees) can expect to understand the reasons for the decision and be presented with those reasons. This must be done intentionally, in order to avoid the situation where the public interest is asserted but no demonstrable link is made to the action involved and a specific interest of the public affected by it.

Protection of the public interest by CPATA comes in many forms. It includes:

- Setting standards for agents to support their competence and ethics in delivering their services – this protects the public who use those services;
- Supporting the profession so that when providing services they uphold the system that protects intellectual property rights;
- Promoting innovation in the delivery of patent and trademark agent services, and the operation of the government’s IP programs;
- Promoting equity, diversity and inclusion in the profession; and
- Recognizing programs and activities that help make IP services accessible to Canada’s innovators and creators.

Operating in a manner that promotes the reputation of the profession and College as worthy of trust and respect, and confirming licensees are competent and ethical is the starting point for saying the public interest is protected.

A specific action undertaken, or decision made must go beyond this to articulate the intended link between the action or decision and the outcome. This will sometimes be assumed. Or it may be obvious there is need of proof through evaluation and analysis. The link between cause and effect must be described and asserted so the public can understand the nature of the intended results.

To illustrate this, consider how more competent practitioners should result in better services for clients. That is not always the case, unless a variety of factors, such as timeliness, affordability, and ethical behavior, are applied by a licensee in delivering services. Decisions by CPATA that assert ‘competence’ must also identify the links between enhancing knowledge and skills as key components of competence and quality of service delivery, so the client benefits from the higher level of competence.

Another example of the primacy of the public interest for CPATA is found in the requirements the Board and Regulatory Committees are comprised of a majority of non-licensees. This is intended to guarantee strong voices and participation of the public in key decision-making where regulatory policies are approved. However, more than mere participation is required.

Decision makers must embody a deep understanding of public service as they fulfill their roles.³

3. Decisions with a Public Interest Component

Though the public interest is foundational to CPATA's governance and operations, certain decisions are made where the Act, Regulations, By-Laws, policies, Regulatory Objectives, Standards and Principles require intentional and strategic consideration of what the public interest entails. They require balancing of interests of the public, licensees, the College, government, and others.

To be meaningful and transparent, these decisions must be effectively communicated, while respecting requirements for privacy and confidentiality. It is not sufficient to make decisions behind a wall of secrecy. CPATA's Board operates in public, with its meeting broadcast and recorded for the benefit of the public. CPATA publishes its regulatory policies so those engaging with it will know the basis upon which matters will be considered, and decisions made. CPATA publishes full or de-identified regulatory decisions on its website promptly, as well as summaries of advice and guidance provided to licensees about their ethical and competence obligations. These help to educate the public and licensees and assist them to evaluate how CPATA is working in the public interest.

Examples of decisions that are public and serve to protect the public interest include:

3.1 The Board

- 3.1.1 Governance Policies development
- 3.1.2 budgetary decisions impacting resources accessed by the public (e.g., website development, meeting bilingualism and privacy requirements);
- 3.1.3 policy decisions relating to transparency and communications (such as the example above of publishing regulatory decisions);
- 3.1.4 policy decisions regarding areas of risk, such as professional liability insurance (deciding to mandate that licensees have professional liability insurance is a key public protection tool) and a risk matrix on which evaluation of anticipated risks are evaluated;
- 3.1.5 admissions standards (committing to psychometrically defensible standards and assessments; support for developing competency profiles).

3.2 The Registrar

- 3.2.1 Registrar's Policies development

³ See [Fit and Proper? Governance in the public interest](#) March 2013

- 3.2.2 the licensing and applications process (e.g., proportional and principled evaluation of applications);
- 3.2.3 managing complaints against licensees (developing an Agent Conduct Inquiry process to provide an avenue for early resolution of conduct concerns);
- 3.2.4 supporting the work of regulatory committees (providing the tools and training needed to facilitate effective decision making);
- 3.2.5 ensuring adherence to statutory requirements (hiring professional staff to guide the College and its regulatory committees in appropriate decision making).

3.3 **Regulatory Committees**

- 3.3.1 decisions about individual applications and licensing matters are made with a view to the Regulatory Objectives, Standards and decision-making principles;
- 3.3.2 customer service standards are supported by timely and open processes and decisions;
- 3.3.3 setting standards for qualification of licensees by supporting and using their experience to develop competency profiles;
- 3.3.4 investigation of complaints in a fair and communicative manner;
- 3.3.5 application of the requirements under the Code of Conduct through careful and consistent consideration of relevant factors regarding a licensee's conduct;
- 3.3.6 conduct of fair and legal adjudicative proceedings through, for example, a commitment to training, learning from experts, and developing efficient and effective processes.

The Regulatory Objectives, Standards and Principles include reference to decision-making principles that are closely followed at every stage, whether by the Board, Committees, the Registrar or management staff.

4. Foundational Public Interest Factors to Consider

What does it mean to 'consider the public interest' when making decisions of any nature? What are the factors to consider?

Relevant factors must be considered when making decisions that may affect the public whose interests are to be protected. To advance its approach to promoting and protecting the public interest, CPATA has enshrined several approaches to how it analyses and applies its public interest lens:

- 4.1 Being proactive, principled and proportionate

- 4.2 A commitment to risk-focused and evidence-based decision making
- 4.3 Consideration of legal requirements under the CPATA Act, Regulations and policies, and applicable legislation such as the *Official Languages Act*, *Privacy Act* etc.
- 4.4 Consistently applying and being guided by the Regulatory Objectives, Standards and Principles
- 4.5 Being fair, accountable, transparent, efficient, and effective.

A decision at any level in CPATA is grounded on these foundational public interest factors, which provide the framework for effective governance. Decisions should refer to public interest factors and apply them openly and consistently.

5. Consideration of Public Interest Factors for Regulatory Decisions

Fact-based and risk-focused decision making is required by the Regulatory Standards. Considerations by the Registrar and Regulatory Committees of the public interest include assessment of these factors as they relate to the nature of the decision to be made. Consideration of how the factors connect to the intended outcome is required.

Risk to the public – Based on CPATA’s knowledge of the risks associated with the issue under consideration. Risks can be actual, anticipated, or foreseeable. Risks are connected to CPATA’s Regulatory Risk Matrix or to an issue identified for inclusion in the Matrix, but in need of immediate consideration in light of the facts being assessed.

5.1 Factors relevant to this assessment may be:

- 5.1.1 In the case of complaints, the nature of the alleged misconduct or lack of competence⁴ and whether the personal or practice circumstances of the licensee are indicative of risk⁵

⁴ These will include whether the conduct is repetitive and ongoing or only one instance; whether the conduct is recent or occurred in the past; if proven, the range of likely disciplinary outcome; whether the conduct arose in the course of the licensee’s practice; whether intervention by the College is necessary to prevent misconduct pending a hearing.

⁵ In medicine, see for an example of factors impacting behaviour – Bratland, S.Z., Baste, V., Steen, K. *et al.* Physician factors associated with increased risk for complaints in primary care emergency services: a case – control study. *BMC Fam Pract* **21**, 201 (2020). <https://doi.org/10.1186/s12875-020-01272-0>

- 5.1.2 In the case of licensing and registration matters, the position or response of the licensee to the matter at hand⁶
- 5.1.3 When considering past conduct, relevant to assessments, in the case of registration applications or complaints, may be whether pre-registration conduct may impact suitability to practise for the purposes of meeting good character requirements⁷
- 5.1.4 When considering the relevance of prior experience for the purposes of fulfilling the 24-month training requirement, consider all relevant factors⁸.

5.2 The licensee's circumstances –when considering risk, factors relating to licensing or complaints are considered⁹.

5.3 Ability to effectively regulate –Is the ability of the College to effectively regulate the IP profession in the public interest reasonably likely to be harmed if the licensee is permitted to

⁶ These will include the level of candour and disclosure of relevant information and the training circumstances of the applicant or licensee.

⁷ The jurisprudence requires consideration of a range of relevant factors that for CPATA might include age at the time of and circumstances involved in a prior criminal or similar offence; frequency and seriousness of any reported occurrences; evidence of rehabilitation (including changes implemented to prevent future occurrences); evidence of positive social contributions since the offence; the degree of supervision by, and guidance of registered patent or trademark agents; and, for foreign applicants, the relevance of the non-Canadian experience to the competencies required to prepare, present and prosecute applications before the Canadian Intellectual Property Office.

⁸ This will include the length, recency, nature, scope, complexity, level of responsibility and diversity of the applicant's experience and the effect of employment interruptions or changing assignments on the applicant's retention of, and ability to build upon, the experience gained;

⁹ These include: any relevant complaints or discipline history, by CPATA or other regulatory bodies; any mitigating factors relevant to an application or complaint, such as the licensee's circumstances or practice environment; any aggravating factors, such as whether the licensee is a repeat offender or has demonstrated a pattern of ungovernability so that compliance with professional standards or any conditions pending a hearing will be unlikely; the impact of an order to place conditions on, suspend or restrict a license on the licensee, and/or the licensee's clients; the significance of any alleged misconduct or other risk factors; the level of notoriety of the matter; or in other words, how a reasonable member of the public might regard the matter; whether the risks or concerns relate directly to a licensee's practice (as compared with a personal matter that does not or has not impacted their practice); any evidence demonstrating an impact on public confidence; and whether public confidence in the ability of the College to regulate the profession is likely to be harmed if the College suspends or restricts a licensee and it later appears that the restrictions or suspension was not warranted

or continues to practice without restrictions pending, if appropriate, completion of an investigation or adjudication of the matter? This may involve consideration of:

5.4 Alternatives – whether the public interest, including in the effective regulation by the College, could be protected through alternate means other than, for example, restrictions and conditions.

5.5 Proportionality – whether the proposed decision is proportional to the identified risk of harm. For example, is a Registrar’s decision not to permit renewal of a license reasonable under all relevant circumstances, taking into account the foreseeable risks to the public if the renewal was permitted?

5.6 Consistency – whether the proposed decision is consistent with previous decisions of a similar nature.

Each decision is recognized to be unique, and the College and its Committees must consider the information, evidence, positions and arguments presented, and balance and give appropriate weight to relevant factors in making a regulatory decision. The factors above should be considered solely for guidance purposes when assessing the public interest in any such decisions.

6. The Public Interest and Policy Development

Public interest is determinative for Board policy decision making. As part of Board decision making, it identifies the ‘public interest’ or the multiple interests at stake (what are the public’s interests in this matter?) and the facts that influence how those interests are assessed. The Board does not simply assert there is a public interest without a factual/evidentiary foundation. Public interest requires a connection between the action to be undertaken and an anticipated outcome.

For example, Board Policy #1 focuses on a clear statement about what CPATA does, how, by whom and for what purpose. The Regulatory Objectives are a definitive statement of purpose. This document alone sets a clear tone for the many ways the public interest will always be the primary factor to consider when making decisions at all levels. But it goes beyond this to

articulate the expected and measurable impact of, for example, a commitment to transparency relating to the Board's activities and decisions.

Board decision making is also premised on the Directors properly filling their roles as public officers. In addition to compliance with CPATA's conflicts of Interest policy, Directors are reminded of their roles in addressing the public interest. They bring selflessness, integrity, objectivity, accountability, openness, honesty and leadership to their role as a CPATA director. Collectively these attributes contribute to the Board's proclivity to public interest based decision making.

Through ongoing self and group evaluation Directors demonstrate their commitment to prioritizing the public interest in all their decision making. Through the development and application of Skills Matrices for the Board and Committees, the Board demonstrates its commitment to ensuring equity, diversity and inclusion, as well as having effective public voices involved at all levels. The Skills Matrices are an effective way of identifying appropriate and necessary factors to consider when making committee appointments and measuring the Board's success in doing so.

7. Conclusion

Public interest is not an amorphous concept. It is a living, breathing concept that gives life to why and how CPATA exists and functions. It flows through the Act, Regulations, By-laws, Code of Conduct, Regulatory Objectives, Standards, Principles and policies. Which public interest factors are relevant to each situation and decision requires careful thought, analysis, balancing competing interests, and a commitment to apply the public interest lens consistently, transparently and in a clear and measurable way.

CPATA is committed to avoiding any temptation (often implicit in self-regulation) to put the interests of the profession, licensees or the College ahead of those of the public. We will be strategic and intentional in staying the course.