

APPENDIX A

The Public Interest and CPATA's Decision-Making

1. Purpose

CPATA is the independent, public-interest regulator of patent agents 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

CPATA serves different 'publics':

For the general public, regulating in the public interest includes regulating in a manner that builds trust among the general public, so they may be confident we are working to strengthen the competencies of patent agents and trademark agents, and helping build and support accessible, ethical and high-quality intellectual property services in Canada.

For innovators and other clients of patent agents and trademark agents, regulating in the public interest includes considering the needs of those seeking access to the professional services provided by patent agents and trademark agents.

For patent agent and trademark agent licensees, CPATA regulates licensees. We set the standards for entry into the professions and the competencies expected of agents and we oversee and support the ethical and competent delivery of their professional services.

Decisions made at all levels of CPATA involve a balancing of interests and evaluation of risk to all of the 'publics' it serves.

This Policy is intended to describe how CPATA strives to maintain its focus on all of the 'publics' it serves as it fulfills its responsibilities under the Act and CPATA's [Regulatory Objectives](#).

Through the statement of purpose in the Act and the Regulatory Objectives, CPATA has determined protection and promotion of the public interest should drive all decisions made and activities undertaken by its Board, committees, the CEO and Registrar and staff.

This policy is aspirational and serves to assist and guide the Board, Committees, the CEO and 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.

¹ S. 6 of the CPATA Act

2. Public Interest as a Key Foundational Principle

Protection of the public's 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 professions so that when providing services, they uphold the system that protects intellectual property rights;
- Promoting equity, diversity and inclusion in the professions; and
- Recognizing programs and activities that help make IP services accessible to Canada's innovators and creators.

CPATA strives to operate in a manner that promotes the reputation of the professions and College as worthy of trust and respect, and to be able to confirm licensees are competent and ethical.

3. Foundational Public Interest Factors to Consider

Relevant factors are 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:

- 3.1. Being proactive, principled and proportionate
- 3.2. A commitment to risk-focused and evidence-based decision-making
- 3.3. Consideration of legal requirements under the *CPATA Act*, Regulations and policies, and applicable legislation such as the *Official Languages Act*, *Privacy Act* etc.
- 3.4. Consistently applying and being guided by the Regulatory Objectives, Standards and Principles
- 3.5. Being fair, accountable, transparent, efficient, and effective.

CPATA seeks to make decisions grounded on these foundational public interest factors, as well as the Decision-making Principles set out in Appendix B, which support the framework for effective governance.

4. Consideration of Public Interest Factors for Regulatory Decisions

Fact-based and risk-focused decision-making are key components of the Regulatory Standards. Considerations by the CEO 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 an important step.

4.1 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.

Factors relevant to this assessment may be:

- 4.1.1 In the case of complaints, the nature of the alleged misconduct or lack of competence² and whether the personal or practice circumstances of the licensee are indicative of risk³
- 4.1.2 In the case of licensing and registration matters, the position or response of the licensee to the matter at hand⁴
- 4.1.3 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 requirements⁵
- 4.1.4 When considering the relevance of prior experience for the purposes of fulfilling the 24-month training requirement, consider all relevant factors⁶.

4.2 The licensee’s circumstances –when considering risk, factors relating to licensing or complaints are considered⁷

4.3 Ability to effectively regulate –Is CPATA’s ability to effectively regulate the IP profession in the public interest reasonably likely to be harmed if the licensee is permitted to continue to practice with or without conditions?

4.4 Alternatives – can the public interest, including in the effective regulation by CPATA, be protected through alternate means other than, for example, restrictions and conditions?

² 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.

³ 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>

⁴ These will include the level of candour and disclosure of relevant information and the training circumstances of the applicant or licensee.

⁵ 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.

⁶ 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;

⁷ 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

4.5 Proportionality – is the proposed decision 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?

4.6 Consistency – is the proposed decision consistent with previous decisions of a similar nature?

Each decision is recognized to be unique, and CPATA and its committees 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.

5 The Public Interest and Policy Development

The 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 is best served by demonstrating a connection between the action to be undertaken and an anticipated outcome.

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 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 the

public interest in 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.

6. Communicating Public Interest Decision-making

To be meaningful and transparent, decisions made in the public interest must be effectively communicated, while respecting requirements for privacy and confidentiality.

For example:

- CPATA publishes its regulatory policies so those engaging with the College 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.

7. Conclusion

Public interest is not an amorphous concept. It is an aspirational, 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.