

Executive Summary

Sustaining Excellence: A New Governance Framework to Serve Innovation

The Government of Canada has given itself the vital goal of making Canada a global innovation leader

The Government proposes to do so by focusing on six areas for action that include improving the ease of doing business and encouraging companies to grow.

Intellectual property is a fundamental element in the growth of innovative companies; the road from idea to commercial product or service includes the key step of protecting the IP inherent to innovation. Because innovation and intellectual property are inextricably linked, countries that are global innovation leaders have robust IP systems.

We have a gap

Patent and trademark agents form a profession with a tradition of excellence, and the Canadian Intellectual Property Office, with assistance from the profession, administers rigorous qualification exams. However, most of the hallmarks of a professional regulatory system are missing: there is no mandatory code of ethics, continuing education requirement, or discipline process.

There is therefore a double anomaly by Canadian standards: a profession regulated by a government agency, and an incomplete regulatory framework. While the provinces have legislated the creation of more than 300 professional regulatory bodies, there is relatively little experience at the federal level with the regulation of professions.

The Intellectual Property Institute of Canada, the association of professionals practising in all areas of intellectual property law, therefore commends Innovation, Science and Economic Development Canada for holding a consultation, in conjunction with CIPO, on a governance framework for patent and trademark agents.

Options

The ISED consultation document proposes that a values and ethics framework be administered by a regulatory body established as one of the following models: an administrative agency within CIPO (Model One); a mixed-model involving CIPO, the public, and the profession, such as the board managed by the Australian government's IP office (Model Two); and self-regulation (Model Three).

Recommendation

With a history of supporting innovation in Canada and being active in various aspects of self-regulation for 90 years, and given the research, discussions, and actions by the profession over the last 20 years, IPIC confidently recommends self-regulation as the best approach to protect the public interest, to help foster a culture of innovation in Canada, and to sustain the excellence of the profession.

Self-regulation is the best approach because:

For clients to have appropriate representation, their professional advocates should not be regulated by the agency to whom they are advocating on behalf of their clients, as would be the case if either Model One or Model Two were adopted. In 1995, Professor Bruce Doern, a public administration expert, stated in a report commissioned by CIPO:

(...) my considered view is that, in the mid-1990s, there is no convincing rationale for the patent and trade-mark profession to be so directly supervised by an agency of the federal government in matters of its professional qualifications. As the federal agency involved, CIPO should focus on its more complex mandate tasks and should not be so closely regulating one of the client groups it must interact with in other vital public interest ways.¹

The objective of professional regulation is to foster and maintain a culture of second nature ethical thinking on right conduct in protecting the public. The evidence supports that, in the great majority of situations, the self-regulatory model achieves that objective. IPIC is not aware of any administrative agency or mixed models in place for a Canadian profession as discussed in the consultation paper, and the Government of Canada need not assume the risks in selecting an untested approach. Furthermore, Models One and Two only address the code of conduct and discipline. IPIC believes that after all the work done by government and the profession over the years regarding the governance framework, it is now time to implement a complete system and that the least-risk path is to employ the self-regulatory model.

Over a million professionals are regulated by self-regulatory bodies in Canada. If the goal is to encourage Canadian companies to innovate and grow, they must see that their innovation professionals, the patent and trademark agents they call upon to help them realize their ambitions, are regulated like the other professionals they hire (e.g. engineers, accountants, and lawyers). If the Government were to choose another

¹ G. Bruce Doern, *The Regulation of Patent and Trade-mark Agent Qualifications: Institutional Issues and Options, A Study Prepared for the Canadian Intellectual Property Office*, June 1995, p. 120

model, it would send the wrong signal to innovators – that these professionals are not reliable.

It is the most cost-efficient model because members of the profession give of their time and energy to ensure its success. For example, members of IPIC contribute approximately \$480,000 of their time annually for the preparation and marking of the admission exams.

The profession has already demonstrated that it has the ability to regulate itself. The profession has shown strong ethical behaviour throughout its history (there have been very few complaints made against agents) and is already involved in many elements of a regulatory framework through IPIC, such as:

- adopting a code of ethics in the 1920s, periodically updated to reflect changes in the public's expectations and court decisions;
- contributing significant resources to the professional examination process (IPIC is named in the *Patent Rules* and in the *Trade-marks Regulations* for its role in the examinations, which shows that the government recognizes the expertise and integrity of the profession with regards to the aspect of professional regulation that has the most impact on the economy: the admission);
- hiring an expert in measurement and evaluation of competency to assist with the preparation of the exams;
- developing strong knowledge in continuing professional development programs; and
- overseeing an insurance program specific to patent and trademark agents to protect both the agents and the clients.

The profession has invested a tremendous amount of time and effort, voluntarily, to facilitate access to the profession. IPIC offers introductory courses in partnership with McGill University every summer and offers via Internet a number of patent and trademark agent training courses and tutorials. Every year, members of the profession volunteer about 1,500 hours of their time (preparing, teaching, and marking exercises) to essentially train their future competitors. In addition, IPIC has a financial aid policy to assist some of the candidates. The self-regulation model is therefore best positioned to deal with various future developments and issues to ensure on-going fair access to practice.

Implementation

IPIC agrees with the consultation paper that the implementation of self-regulation is best achieved by the creation of a new organization whose purpose will be the regulation of agents in the public interest, and agrees with the suggested appellation of *college*. IPIC proposes that this organization be called **College of Patent and Trademark Agents of Canada / Ordre des agents de brevets et de marques de commerce du Canada**.

IPIC's response to the ISED consultation has a dual purpose: it provides comments on the proposed models and answers to the questions posed, and it provides suggestions on implementation, demonstrating a straightforward approach to establishing the proposed College. IPIC hopes that providing the result of its research and consultations with members will help both the government and the profession to act efficiently in creating a governance framework to serve innovation in Canada.

Instilling and maintaining an ethical consciousness and ethical-based conduct will be an underlying theme in policy considerations and program development. Various tools and processes can be, and are, used in self-regulation models to achieve this objective (CPD, codes of ethics, on-going communications to members, peer review and involvement, etc.).

In this regard, IPIC makes recommendations, provides options for consideration, and suggests implementation steps:

To maintain or improve aspects of the current system when transferring the responsibility of the register of patent agents and list of trademark agents from CIPO to the College (e.g. regarding firms on the register/list);

To balance protection of the public and accessibility in the admission process when implementing the recommendations of CIPO's *Modernizing the IP Community* initiative and examining other public interest considerations;

To contribute to efficient and effective self-regulation through a guiding philosophy focused on public protection and new professional requirements such as mandatory continuing professional development (CPD) and insurance;

To protect the public with a code of ethics and a complaints/discipline process (IPIC provides a complete code of ethics and, in the form of by-laws, a detailed discipline process); and

To be an effective, efficient, transparent, and accountable organization in terms of governance (including the appointment of members of the public to the Council), committees, staff, and budget.

Finally, IPIC provides legislative options to implement the governance framework. Both options would ensure accountability of the College to the Minister of Science, Innovation and Economic Development:

As mentioned in the consultation paper, one option is stand-alone legislation such as the *Canada Lands Surveyors Act*. However, a disadvantage of the stand-alone legislation option is that it is difficult to amend as may be necessary from time to time.

IPIC also examines the option of legislation similar to sections (5), (5.1), and (6) of article 91 of the *Immigration and Refugee Protection Act* (added in 2011). This option would involve simple amendments to the *Patent Act* and to the *Trade-marks Act* that would allow the Minister to designate a regulatory body, require that body to report on its activities, and be able to revoke the regulatory powers of that body. This approach provides flexibility for the regulator to adapt as the environment evolves and it ensures that the regulatory body performs well because it would be simple for the Minister to remove the regulator's powers.

IPIC provides, as a starting point for discussion, possible amendments to the *Patent Act*, *Trade-marks Act*, *Patent Rules*, and *Trade-marks Regulations* to implement this legislative option (and that may also be required to complement stand-alone legislation).

IPIC's role

IPIC understands the government's desire to act quickly on innovation initiatives and is ready to assist the government and take a proactive role in the creation of the College. The overriding goal for IPIC's assistance will be to help establish the College as soon as practical, and then withdraw to ensure that the College is, and is seen to be, a separate and distinct entity. In this regard, IPIC proposes to work with the government on the legislation to modernize the governance framework and to manage the initial steps in the creation of the College after legislation is enacted (e.g. recruiting a governing Council and implementation committees, providing support to these groups, drafting of by-laws, rental of office space, incorporation (depending on legislation), and organizing the founding general meeting.)

Win-Win-Win

With the creation of the College of Patent and Trademark Agents of Canada:

The public interest and innovators will benefit because the recommendations of the *Modernizing the IP Community* report can be implemented. The College will provide the key elements of a modern governance framework: admission, professional requirements, code of ethics, and a complaints and discipline process.

The government will benefit because it can retain oversight of the regulatory system while allowing CIPO to focus on its core mandate. The Minister will be able to monitor the regulatory activities of the College without having to devote resources to an activity that is not usually performed by government in Canada.

Both the public interest and the profession will benefit because the latter is the group the most motivated to devote time and resources to sustaining its excellence. The profession's body of knowledge will be used to set standards and to judge the actions of its members in protecting the public.