# First court decision judicially reviewing decision of investigations committee of CPATA

**September 11, 2024**

On August 28, 2024, the Federal Court issued the first judicial review of a decision by the Investigations Committee (the IC) of the College of Patent Agents and Trademark Agents (CPATA) dated November 25, 2022 (the Decision). The Court dismissed the application. The Court declined to award costs because it is the first case to be brought to the Court and because it involved a self-represented litigant.

## The IC decision

The Applicant in the judicial review, Andrew Olkowski (Olkowski), asserted in the Complaint that gave rise to the IC's Decision, that:

- the Respondent Ted Yoo (Yoo), a lawyer and patent agent, acted as his patent agent in respect of a patent application;
- Yoo misrepresented the applicant of the application before the Canadian Intellectual Property Office (CIPO);
- filed false or misleading documents with CIPO;
- breached fiduciary duties owed to Olkowski; and
- acted negligently in failing to file other relevant documents with CIPO that indicated the relationship between Olkowski and Yoo.

As a result of Yoo's actions in this regard, Olkowski asserted that:

- he lost control of the application;
- he should have been named an applicant, and not only inventor;
- the named applicant and owner of the application was only a licensee of the technology and had been named incorrectly; and
- that the co-inventors identified on the application were also incorrectly named.

The IC concluded that the evidence did not support a finding of professional misconduct or incompetence on the part of Yoo, or that Olkowski was a client of Yoo. However, the IC also concluded that the interactions did not follow best practices as Olkowski was unrepresented, so the IC indicated that it would provide the Respondent with guidance for future practice.

# The application for judicial review

In the judicial review, the Applicant asserted that the decision was unreasonable on the basis that the IC failed to properly consider the relationship between Olkowski and Yoo, and that the IC erred in its consideration of a power of attorney document. The Applicant argued that the power of attorney document was evidence that the Applicant had appointed Yoo as his agent.

# The Court's decision – Preliminary issues

The Court set out the background of the interactions between the Applicant, various companies and Yoo. The Court then set out the relevant provisions of the *CPATA Act*. The Court noted that a right of appeal of an IC decision is not explicitly set out in the *CPATA Act,* but the Court concluded that the IC is a "federal board, commission or other tribunal" such that sections 18 and 18.1 of the *Federal Courts Act* apply. Furthermore, neither party challenged the jurisdiction of the Court to hear the matter.

The Respondent College of Patent and Trademark Agent requested that the style of cause be amended to remove the IC as a named Respondent in accordance with Rule 303(1)(a) of the *Federal Courts Rules* and no parties objected to the proposed amendment.

The Respondents also objected to the attempt by the Applicant to lead new evidence before the Court and raised the admissibility of the new affidavit as a preliminary issue for determination. The Court concluded that the affidavit is inadmissible although the exhibits attached to the affidavit should remain in the Applicant's record, as they were before the IC. The Court noted that generally, evidence that was not before the decision maker and that goes to the merits of the issues is not admissible in an application for judicial review unless the evidence falls within certain limited exceptions. The evidence in the Applicant's affidavit did not fall into any of the exceptions.

# The Court's decision - Merits

The Applicant raised a number of issues, which the Court summarized as being:

- whether the IC erred by failing to conduct a thorough analysis of the evidence before concluding that the Applicant was not a client of the Respondent; and
- did the IC err in its consideration of the power of attorney document.

The parties agreed that the standard of review for the substantive issues is reasonableness.

With respect to the first issue, the Court reviewed the evidence that the IC relied upon and concluded that it was reasonable for the IC to conclude that the Applicant was not a client of the Respondent. The IC had concluded that there was no evidence that Yoo had provided patent agency services or legal representation to Olkowski, or that he had agreed to provide those services. There was no evidence to establish that Yoo had direct communications with Oklowski, and there was no retainer agreement. Further, the Decision specifically stated that all the evidence that was filed by the parties was

reviewed. The Court found that it was reasonable for the IC to focus on the questions relating to whether Olkowski was Yoo's client.

With respect to the second issue, the Court concluded that the IC set out a rational basis for its conclusion in respect of the limited questions before the IC. The power of attorney document was not filed with CIPO and thus, any conclusion that could be drawn with respect to the significance of this document would only apply in the US. Other issues raised by Olkowski could not be addressed by the IC, such as the assignment in a licence agreement. There was no reviewable error demonstrated by the Applicant.

# Key takeaways

This decision should be reviewed in detail by patent agents, especially in situations involving self-represented individuals. The Court noted that the IC in its Decision "recognized that Yoo should have advised Olkowski as an unrepresented person, to seek independent legal advice with respect to his interests as the inventor of the technology. The IC also concluded that Yoo should have made it clear that he would not protect those interests as he was acting exclusively in the interests of NBI."

By

Chantal Saunders, Beverley Moore

Expertise

Intellectual Property, Municipal & Land Use Planning

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**Montréal**

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

**Toronto**

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749