

Intellectual property law in Canada: Protect your innovations here

September 02, 2025

This article is part of a practical series written for international companies looking to establish, launch, operate or invest in a business Canada. Each article covers a major area of law in Canada – everything from employment laws to taxes. Access all the articles on the [“Doing business in Canada: A practical guide from ‘Eh’ to ‘Zed’”](#) page.

Canada is a country committed to being a global innovation leader and intellectual property features prominently in Canadian legislation. As discussed in this chapter, firms in IPR-intensive and other industries create value by securing exclusive rights in the form of patents, trademarks, copyrights, industrial designs, and trade secrets, among other forms of intellectual property, and then commercializing these rights to extract value.

The European Patent Office and the European Union Intellectual Property Office recently (January 2025) published a study demonstrating that companies that own intellectual property rights (IPRs) outperform companies without these rights. This was true for both large companies and small and medium enterprises (SMEs). The study also found that wages and revenue per employee are higher in companies that own IPRs as compared to those that do not. This difference was shown both overall, and individually for patent, trademark, and design rights. A 2022 study by the same groups estimates that over 47 per cent of the EU’s total economic activity is generated by IPR-intensive industries and that 39% of all EU employment is directly or indirectly from IPR-intensive industries. In 2022, the U.S. Commerce Department released a report, titled “Intellectual Property and the U.S. Economy: Third edition.” It found that in the U.S., IPR-intensive industries support at least 63 million jobs (33% of total employment) and contribute more than 41% of the GDP.

Patents

Technology innovation and inventions are the lifeblood of many companies, and patents help protect the value of these innovations and inventions.

When an inventor or owner of the invention obtains patent protection, they are granted the statutory right to exclusively make, construct, use, and sell the invention.

In exchange for this exclusivity, the inventor must disclose sufficient information about the invention to allow others to make use of the invention after the patent expires. The term of a Canadian patent is 20 years from the filing date of an application. Canada has two forms of patent term restoration; one for delays in the patent office issuing a patent, and one for delays in Health Canada approving a product. These terms run concurrently in cases where both are applicable to patents relating to pharmaceuticals.

An invention is defined as “any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement” thereof. To be patentable in Canada, an invention must meet these requirements of novelty, utility, and inventiveness. The invention also must be patentable subject matter, discussed further below.

Like most countries, Canada has adopted a first-to-file rule, so the person entitled to obtain a patent for an invention is the first person to file a patent application for the invention. Canada is also a member country of the Patent Cooperation Treaty (PCT). This treaty provides a patent applicant with a cost-effective method to file internationally, including in Canada, while maintaining the same international filing date.

Canada does not require absolute novelty. Accordingly, it is possible to file a Canadian patent application within one year of the first public disclosure of the subject matter of the invention, if that disclosure was made by the applicant (or by someone who obtained knowledge from the applicant). Similarly, this one-year grace period for disclosures by the applicant or someone who obtained knowledge from the applicant applies to the obviousness analysis. If a public disclosure is made by someone other than the applicant, the grace period applies to the time from the priority date of the patent application to is calculated back one year from the eventual filing date of the application. In the case of an international patent application that later enters Canada, the filing date is considered to be the international filing date.

Subject matter that is patentable in Canada is generally similar to what is patentable in most other patent systems. A mere algorithm is not patentable. However, business method and diagnostic methods can be patentable with suitable attention to drafting a description and claims that comply with Canadian requirements. There are also restrictions in Canada on patenting higher life forms. However, such inventions can usually be protected with claims to other aspects of the invention. As of the writing of this guide, methods of medical treatment are also considered to be non-patentable subject matter. However, that issue is currently before the Supreme Court of Canada, with a decision expected in 2026. The courts have upheld patent claims to uses, including medical uses, claims to which can often afford protection for inventions involving therapeutics.

Pharmaceutical patents - Unique considerations

Canada has a system linking generic and biosimilar drug approval to clearance of patent hurdles, similar to that found in the U.S. Certain types of patents and Certificates of Supplementary Protection (CSPs) can be listed on the Patent Register for a new drug. Any generic company seeking to enter the market must allege that these patents either are not infringed and/or are invalid, or await their expiry. If the innovator chooses to challenge the non-infringement and/or invalidity allegation in court, the generic/biosimilar company cannot enter the market until the challenge is lost. If the

challenge is won, the generic/biosimilar company cannot enter the market until the expiry of the patent. Listing of patents on the Patent Register is voluntary. However, listing is the method to take advantage of these linkage regulations, which are typically the only way an innovative pharmaceutical company can obtain what amounts to an interlocutory injunction to preserve its market while the patent litigation is pending.

As mentioned above, certain types of pharmaceutical patents can be eligible for patent term restoration (a Certificate of Supplementary Protection) if the relevant conditions are met. Importantly, the New Drug Submission must be filed in Canada within a year of the first similar regulatory filing in any of the U.S., the U.K., the EU or its member countries, Switzerland, Australia, or Japan. Up to two years of additional term can be granted.

In addition, pharmaceutical companies in Canada are required to report patents and CSPs pertaining to a medicine to the Patented Medicines Prices Review Board (PMPRB). These patents and CSPs need only relate to the medicine by the “merest slender thread” to require reporting. Any drug that has patents or CSPs pertaining to it is subject to the jurisdiction of the PMPRB, which will set the maximum price the drug can be sold at in Canada at all times during the pendency of any patent or CSP. However, the PMPRB is not the only regulatory body in Canada that governs the price at which a medicine can be sold. Thus, it is prudent to talk to a lawyer

Regulatory data protection

Canada has regulatory data protection for both biologic and small molecule innovative drugs. This data protection applies regardless of whether there are patents pertaining to the drug in question.

A total of 8 years typically applies, broken into two parts. No generic or biosimilar filer is permitted to file their drug submission in Canada for the first 6-years of that time period. Such filings can be made in the remaining two years, but regulatory approval cannot be granted until the full 8-years have passed.

An additional 6-months is available if pediatric studies are done and submitted before the 5-year mark after the first regulatory approval.

Trademarks

A company’s brand helps set it apart from its competitors. A trademark is a critical part of a company’s brand that helps its customers easily identify its products and services from its competitor’s offerings.

In Canada, a trademark can be a word, a design, a combination of words and designs or other distinctive identifiers (such as shape, colour and sound).

Canada’s trademark legislation has undergone significant changes to harmonize its trademark law and process with international treaties. As a result, Canada is now a member of the Madrid Protocol and uses the Nice classification system for the classification of goods and services.

In addition, based on amendments to its national *Trademarks Act*, applicants for trademark applications in Canada are no longer required to declare use at the time of filing or at any time prior to registration, nor are there any use requirements to maintain a registration. This has significantly streamlined the trademark registration process - even though Canada, like the United States, requires further specification of goods and services covered by trademark applications.

Registration of a trademark provides substantial benefits. Most significantly, registration grants the owner the exclusive right to use the registered trademark for specific goods and services and to enforce the trademark throughout Canada. Registration also provides certain remedies for infringement that are not available to or for unregistered trademarks.

Canada's Combatting Counterfeit Products Act is designed to provide ways for trademark owners to address the importation, detention and destruction of counterfeit products. This Act allows for trademarks to be registered with the Canada Border Services Agency and adds significant criminal sanctions against any person who knowingly manufactures, imports, exports, sells or distributes "on a commercial scale" goods, labels and packaging, and advertisements for services, that bear a trademark that is identical to, or that cannot be distinguished in its essential elements from, a registered mark.

All goods and services included in a Canadian trademark application, however, must be set out in ordinary commercial terms. The requirement for further specification of goods and services remains unchanged by the amendments to the Trademarks Act mentioned above.

A registered trademark, if renewed, can be kept in force indefinitely.

The entire registration process takes approximately 18 to 24 months, if no objections or oppositions are encountered. Use of a trademark may generally commence prior to completion of the registration process. However, thorough searches are recommended before such use to be sure someone else is not already using the trademark.

In Canada, a trademark owner must control the character or quality of its licensees' goods or services. This legislative requirement applies even when the owner permits one of its subsidiaries to use the owner's trademark. Failure to exercise such control may prejudice the trademark owner's interest in its trademark. Trademark owners doing business in the province of Québec should also ensure that packaging and labelling for products and advertising for goods and services are compliant with the additional requirements of the *Charter of the French language* and its related regulations (which seek to ensure that French is adequately represented).

Subject to certain conditions, foreign governments, armed forces, universities and international intergovernmental organizations may request that their national, territorial or civic flags, arms, crests or emblems be recognized as official marks. Official marks can prevent the registration of identical marks or trademarks so nearly resembling an official mark as to be likely to be mistaken for it. Official marks are not open to opposition by third parties during application and continue until voluntarily withdrawn or inactivated pursuant to a court order. Additionally, official marks are not limited to specific goods

and services, are not examined on relative or absolute grounds and do not require periodic renewal.

Copyright

Copyright helps protect original creations. Literary, musical, dramatic and artistic works can all be protected by copyright.

Copyright is “the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof,” and includes certain other specific rights.

Copyright applies to qualifying authors of certain types of works. To qualify, the author must be a Canadian, or a citizen or resident of the British Commonwealth or a foreign country that is, like Canada, a member of the Berne Convention. If the author meets these qualifications, the original literary, musical, dramatic or artistic work will be protected by copyright in Canada if the work is fixed in a physical embodiment such as text, recordings, works of art, and the like. The length of protection for copyright in Canada is generally the life of the author plus 70 years. A shorter term applies for some works.

The categories of literary, musical, dramatic and artistic works are widely defined. For example, artistic works include not only paintings and sculptures, but also maps, charts, plans and architectural works of art. Similarly, literary works include computer programs. To qualify for copyright protection, a work must be original in the sense that it originated with its author and was not copied from another source.

Copyright does not need to be registered in Canada. If the author qualifies and the work meets the necessary requirements, then that work will be protected by copyright in Canada. However, registration provides certain benefits, such as establishing the existence of the copyright, and creating a presumption of ownership that helps an owner enforce the copyright. There are no time limits to register a copyright and no review process before obtaining a registration.

Authors’ moral rights are also protected. These rights ensure that the author of the work is properly attributed (or that anonymity is respected) and that the work is not modified in a way that prejudices the author’s reputation. Only the author can enforce its moral rights; the rights cannot be assigned.

Copyright infringement occurs when a person does anything that only the copyright owner has the right to do (unless the owner consents). Infringement of moral rights is also actionable. Remedies are available if there is copyright and/or moral rights infringement. There are also exceptions to infringement, such as fair dealing.

The Copyright Board of Canada oversees the collective administration of copyrights. The Board supervises and manages the administration of copyrights by collective societies. Collective societies are responsible for large collections of works, depending on the rights that they supervise. The Board’s primary function is to certify tariffs of royalties that are proposed by collectives.

When a collective society and user cannot agree on royalties or terms of use of certain works, the Board may be asked to fix such royalties and terms of use.

The circumvention of digital locks that copyright holders use to prevent unauthorized dissemination of their protected works is prohibited. There are exceptions to this prohibition, including reverse engineering for the purposes of security testing and related research. There are further exceptions for temporary, technical and incidental copies that are made of copyrighted materials. These exceptions may provide greater certainty to innovation companies in the software and computer industry. Recent amendments relating to diagnosis, maintenance or repair, and interoperability were made to the *Copyright Act*.

Internet service providers and search engine companies will not be held liable for the infringing activities engaged in by users of their services. Further, a “notice-notice” approach allows a copyright holder to provide notice of an alleged copyright infringement to the service provider, and the service provider will then forward that notice to the alleged infringer.

The provisions of the Copyright Act are technology neutral to ensure that the Act is adaptable to the rapidly evolving world of digital technology. This may provide greater comfort to businesses that deal in cutting-edge technologies.

The Copyright Act includes criminal offences, civil remedies and border enforcement mechanisms intended to combat infringement and the import and export of counterfeit goods.

Industrial designs

Industrial designs protect the original features of shape, configuration, pattern or ornament, and any combination of those features that, in a finished article, appeal to, and are judged solely by, the eye.

Examples include designs for furniture, shoes, smartphones, bottles, vehicles, household utensils, toys and fabrics. Design features that are solely functional, or methods or principles of manufacture or construction generally, do not qualify as industrial designs (but these may be patentable).

To be registered, designs must be original - the author has, through the exercise of intellectual activity, created a design which had not occurred to anyone before. At a minimum, the design must not be similar to a previously registered design or be describable as common or within general knowledge.

In Canada, an industrial design application cannot be registered if it is filed more than one year after the publication of the design anywhere else in the world.

The term of protection begins on the date of registration and ends on the later of 10 years after registration or 15 years from the Canadian filing date, offering protection for up to 15 years, provided the maintenance fee is paid.

Once registered, articles embodying the design may be marked so as to put others on notice of the registration. Failure to properly mark articles may preclude recovery of damages from an infringer.

Trade secrets

A trade secret is business information that has been kept confidential and has value. Examples can include inventions (unless they are published in a patent application), chemical formulas, compilations of data, research, business processes and techniques, and marketing information.

Trade secrets are not registered, but must be kept confidential. They can be protected for an unlimited period of time if they can be kept secret. Companies must implement safeguards and processes to ensure that trade secrets are not disclosed or misappropriated.

For trade secrets that are also inventions, companies can decide whether they wish to seek patent protection or maintain the secrecy of the trade secret. The decision depends on a number of factors, including the likelihood the invention can be kept secret, the likelihood that it cannot be reverse engineered, the chances that a competitor will independently develop the trade secret, and the likelihood of obtaining a patent.

Other forms of intellectual property

Protection is also available in Canada for integrated circuit topographies and plant breeders' rights.

Commercialization and licensing

The value of intellectual property can be unlocked through commercialization - using the intellectual property, licensing it to others, selling articles using the intellectual property (or selling the intellectual property itself) - or by enforcing intellectual property rights.

Generally, all types of intellectual property can be licensed in Canada, and no one statute will govern such licensing. Rather, the general common law governing contracts normally applies. Additionally, licences for trademarks must comply with the control requirement described in Trademarks section above.

The licensing party can grant a licence to one or many licensees, and has many options available to determine the limitations of the licence.

There are three primary types of licences: an exclusive licence, a sole licence, and a nonexclusive licence. An exclusive licence means the licensee is the only one that can use the licensed intellectual property (even the licensing party cannot use the intellectual property). A sole licence means only the licensee and the licensing party can use the intellectual property. A non-exclusive licence allows the licensing party to grant as many licences as it wants. Most commercial software licences are granted as non-exclusive licences.

Although licences can be unlimited, they are often restricted in certain ways by the licensor, such as with respect to time, geography or use. A licence can be geographically limited so that the licensee is permitted to use or market the licensed IP rights only within a particular territory. A licence can be limited as to time so that the licence will be in effect only for a specified term (for example, one year, 10 years, etc.). A licence can be limited with respect to use in that licences can restrict the licensee's use of the licensed IP rights to only certain specified activities or fields. The remedies available in the event of a breach of an intellectual property licence are the same remedies available for any breach of contract.

Intellectual property enforcement

In Canada, IP litigation is mainly conducted in the Federal Court, as it has the power to issue a country-wide injunction, and it is the only court that can invalidate patents, trademarks, and industrial designs *in rem*. Federal Court judges generally have more experience with IP issues than provincial court judges. However, Federal Court judges have varied backgrounds, not all of which are technical.

The Federal Court is a court of statutory jurisdiction. This means that if the litigation has a large component founded in breach of contract or tort, a provincial court may be better suited to litigate the claim.

There is a special procedure for certain types of pharmaceutical patents listed on the Patent Register, as described above. These cases must be brought in the Federal Court.

Interlocutory injunctions are difficult to obtain in many IP infringement cases, in particular in patent infringement cases. One of the elements that must be proven is 'irreparable harm not compensable by way of damages' and the jurisprudence has set this bar extremely high. In a few recent trademark cases, the Court has recognized irreparable harm and granted the requested interlocutory injunction.

Litigation proceeds with the typical steps: pleadings, discovery, preparation of expert reports (if necessary) and trial. Complex cases can be assigned case-management, which helps to move the parties toward trial in a timely manner. Expert witnesses are not examined by the opposing party prior to trial. Discovery is limited to issues relevant to the pleadings. This is generally described as documents that will help or hurt either party's case and documents that a party plans to rely on at trial. A single representative of a party is discovered. In addition, any inventor or other assignor can be discovered. If a party wishes to discover anyone else, a motion is required.

Canada does not have Markman hearings. Summary judgment motions are difficult to bring due to the test that must be met in order to be granted. However, Canada does have a summary trial practice that have been used effectively to streamline trials or decide issues that may be dispositive of the need for a trial.

Canada is mainly a common law jurisdiction. (If litigating in Québec provincial court, it is a civil law jurisdiction.) Trials are typically two weeks or less and are tried in front of a judge alone. Either party can appeal the judgment as of right. It is important to note that a portion of attorney's fees are typically awarded to the successful party.

Permanent injunctions are often awarded in Federal Court when the IP is valid at the end of trial. Such orders are typically accompanied by orders for delivery up or destruction of infringing merchandise. Parties can also obtain orders for damages or an accounting of the infringer's profits.

Pre-judgment and post judgment interest is often awarded. Furthermore, parties can claim punitive damages for egregious conduct. The Federal Court is a court of equity and will consider equitable remedies under equitable principles.

Intellectual property strategy

While individual intellectual property assets can have value, this value can be increased by using a comprehensive and integrated strategic approach. Such an approach should encompass securing innovations, a company's branding, and its creations, in order to properly leverage intellectual property that has been protected and take enforcement steps against infringers. In the case of pharmaceutical and biotechnology companies, this strategy should also encompass consideration of the specific regulatory provisions that can have an effect on IP rights in Canada. This will help to maximize and maintain the value of the intellectual property concerned.

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