Patent term adjustment is coming to Canada

April 27, 2023

IP owners, their lawyers, and agents received a first glimpse of what Canada's new patent term adjustment (PTA) system is going to look like. Draft legislation was introduced in Parliament and had its first reading on April 20, 2023 as part of an omnibus bill to implement the federal budget.

The draft legislative changes to the *Patent Act* are quite minimal at this stage, setting up regulations to be implemented in the future that will prescribe most of the details of the system.

Canada is required to implement PTA under the Canada-U.S.-Mexico Agreement (CUSMA). The draft legislation follows significant changes to the Canadian patent system implemented in late 2022 to streamline examination in advance of PTA.

Patents having a filing date on or after December 1, 2020 will be eligible for PTA if the other prescribed conditions are met. In accordance with CUSMA, the draft legislation confirms that the coming into force date for PTA is to be no later than January 1, 2025.

To obtain PTA, an application will have to be submitted, together with a prescribed fee, within three months of the date on which a patent is granted. This means that as currently proposed, the legislation appears to have retroactive effect for patents granted in the preceding three-month period at its coming into force date.

Maintenance fees will additionally be required to maintain patent rights under PTA. It remains to be seen whether these maintenance fees will be different from those payable currently at the end of patent term.

The current draft indicates that the new adjusted patent term due to delays in patent examination will run concurrently with patent term restored under Canada's Certificate of Supplementary Protection (CSP) regime, which addresses delays in obtaining marketing authorization.

The draft legislation permits the Commissioner of Patents to reconsider and shorten the term of PTA, both independently and on application of a third party with payment of a fee. The draft legislation also empowers the Federal Court to shorten the term of PTA. Thus, it appears that challengers will have multiple new avenues to argue that the adjustment should not have been granted.

The draft legislation indicates that PTA will be available if a patent granted after the later of (i) the third anniversary of the examination request date, or (ii) the fifth anniversary of a "prescribed day" that is apparently to be defined differently for PCT, non-PCT, and divisional applications. The prescribed day, in each case, will be defined by as-yet-unpublished regulations. It seems likely that the "prescribed day" in each instance may be the national phase entry date, the filing date, and the divisional presentation date, respectively. This appears to accord with CUSMA, which requires that there be adjustment if the patent is not granted within three years of the request for examination, or five years of the filing date.

The term of PTA term will be based on the difference between the date of grant and the later of these two anniversaries *minus* days to be defined in the unpublished regulations. The CUSMA indicates that days of delay caused by the applicant can be subtracted from the adjusted period. Thus, it seems likely that days following a request for continued examination (RCE) will be subtracted, as the introduction of RCEs was one of the late 2022 changes enacted as a prelude to PTA. Similarly, days of delay that are not seen as the fault of the Patent Office will also likely be excluded.

Full details of the new system of PTA will only be known when associated regulations are published. That will happen once this draft legislation is subject to a second reading in Parliament, is discussed by committee, and undergoes a third reading in Parliament before three readings in the Senate and Royal assent. Amendments to the legislation are possible at all these stages prior to the third Senate Reading. However, given the minimal details present in the draft legislation and the fact that the amendments to the *Patent Act* are a few pages of a much larger omnibus bill focussed on passing the most recent federal budget, few amendments are expected.

Applicants do not need to take any action at this stage. BLG will be closely monitoring for developments and for the draft regulations to come.

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