Practical tips on patent term adjustment in Canada

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Summary

Patent term adjustment (PTA) to compensate for unreasonable delays at the Canadian Intellectual Property Office (CIPO) may apply to Canadian patents granted after December 1, 2025. Administrative delays at CIPO have increased the importance of considering PTA in prosecution strategies. While several aspects of PTA are outside an applicant's control, the likelihood of PTA can be significantly increased by delaying the examination request. In this article, we present practical guidance on Canada's new PTA regime.

Recent events

When Canada's system of patent term adjustment (PTA) was announced, it appeared to be a non-event due to the generous prosecution time allotted to the Canadian Intellectual Property Office for examining and granting a patent. Initially, it seemed that PTA would rarely be available. Since then, significant delays at CIPO have made PTA a much more likely prospect.

Practical considerations

The regime is quite complex, with no fewer than 28 categories of possible "days to be subtracted" from PTA term. Not all of the information required for a full PTA calculation is available in the public record. Nonetheless, conceptually, the system can be likened to a chess clock under which PTA is based solely on the time that CIPO uses to examine and grant an application. Using this analogy, we present practical advice on Canada's PTA system, including a tip for increasing the likelihood of obtaining PTA.

1. **Ongoing delays at CIPO should make PTA more commonly available.** CIPO has either three or five years of prosecution time (see point 3) following an examination request to issue up to three office actions and to grant a patent following payment of the final fee (grant fee). Data from CIPO's published performance targets and service standards indicate that these steps may now routinely take between 4.25 years (for chemistry and the mechanical arts) and

4.75 years (for biotechnology and the electrical arts).[1] These timelines were adversely impacted by server and software upgrades carried out in 2024 and worsened noticeably in 2025. If these delays continue then PTA may become more routinely available.

2. **Timely or delayed action by an applicant in respect of office action deadlines should not impact PTA**. Like a chess clock, when CIPO issues an office action, its "prosecution clock" stops running and the applicant's clock starts. Delays caused while a prosecution step is in the hands of the applicant do not result in PTA because the delay is directly nullified by corresponding "days to be subtracted" (DTBS), which are based on the applicant's prosecution clock. Thus, for example, if a response is filed one week after an office action is mailed then one week of DTBS will accumulate to cancel out the week of prosecution delay. If, on the other hand, the applicant takes the full four months to respond, the ensuing four-month delay to grant is cancelled by four months of DTBS. The same applies if an extension of time is requested and/or if the reinstatement mechanism is used to provide additional time. In all cases, the delay to grant is cancelled by equivalent DTBS. Therefore, an applicant who requires time to decide on a response strategy can rest assured that delayed action at their end should have little to no impact on PTA. It is only when CIPO overruns the allotted time on its prosecution clock that PTA term accumulates in a meaningful way.
3. **Delaying the examination request should increase the likelihood of PTA.** The single opportunity that an applicant has to influence the time allotted to CIPO relates to when examination is requested in relation to the application's start date[2]. When examination is requested *after* two years[3] from the applicable start date, CIPO's prosecution clock is reduced from five years to three years. Applicants who wish to request examination around the two-year mark should consider waiting until two years plus one day from the applicable start date. However, this strategy will usually not be available for divisional applications due to short examination request deadlines.
4. **Most prosecution time following an RCE or third office action is irrelevant to PTA**. CIPO's prosecution clock stops running when the examiner issues a third office action or when the applicant submits a request for continued examination (RCE). In these situations, CIPO's prosecution clock only starts running again once the final fee is paid. Thus, there is no incentive for CIPO to examine an application expediently following a third office action or an RCE, at least as far as PTA is concerned.
5. **A missed maintenance fee payment will pause CIPO's prosecution clock.** The period between a missed fee and the corrective late fee payment is not considered unreasonable delay and CIPO's clock does not run during this time.
6. **CIPO does not automatically advise applicants of PTA eligibility**. Unlike the USPTO, CIPO does not provide applicants with a complimentary calculation of PTA term. Instead, an application for PTA must be submitted with a significant fee of (in 2026) about CAD $2,570 (or about $1,030 at the small entity rate), after which CIPO will make a preliminary PTA determination before either granting an adjustment of patent term or dismissing the request.
7. **Eligibility requirements**. For the PTA system to apply, an application must be filed on or after December 1, 2020. No patent granted prior to December 2, 2025 is eligible for PTA. A patent granted on or after this day may be eligible for PTA if the date of grant is after the **later of** (i) five years from the applicable start date[2] and (ii) three years from the examination request date. To calculate PTA term, the delay to grant must be assessed against the DTBS to determine the unreasonable delay on the part of CIPO.

8. **The PTA application process entails short deadlines**. An application for PTA must be submitted within **three months** of the date of grant. Following CIPO's preliminary determination of PTA term, an applicant has **two months** to submit observations. When the applicant disagrees with the final determination, judicial review may be requested within **30 days**.
9. **There are PTA-related reporting obligations for certain pharmaceutical and biotechnology patents**. When a patent is listed on the *Patent Register* under Canada's linkage regime, the Minister of Health must be informed of the adjusted term. When the patent relates to a medicine, the patentee is also obligated to report the adjusted term to the Patented Medicines Prices Review Board (PMPRB) within 30 days of the final determination. The PMPRB's jurisdiction over pricing will apply to the adjusted term.

With the significant, ongoing delays at CIPO, PTA is a realistic possibility that should be considered when deciding on a patent prosecution strategy for Canada, and in particular when later-stage market exclusivity is most valuable. Deferring the examination request will help to increase the likelihood of PTA term by reducing the time on CIPO's prosecution clock. Fortunately, deferring the examination request is a common strategy that allows information from commercial developments and worldwide examination to inform Canadian prosecution.

BLG can assist you in determining if your patent may be eligible for patent term adjustment.

Footnotes

[1] Data is current as of May 2025 and has not been updated since due to "a recent digital transformation".

[2] The "applicable start date" is the national phase entry date (for a PCT application), the filing date (for a *Paris Convention* application or direct Canadian filing), or the presentation date (for a divisional application).

[3] That is to say, on or after two years plus one day from the applicable start date.

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