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PEQUILIARITIES OF INTELLECTUAL PROPERTY PROTECTION IN CANADA

Canada provides statutory protection for patents, trademarks, copyright and industrial designs, as well as common law protection for trade secrets and against passing off. The relative importance of each of these rights depends primarily on the type of protection that is required and the kinds of third-party activities that are of concern.

Pursuant to the Patent Act, 2 an inventor may obtain a patent for any new, useful and non-obvious art, process, machine, manufacture or composition of matter or any new, useful and non-obvious improvement thereof. Patents are issued by the Canadian Intellectual Property Office (CIPO) and are presumptively valid for 20 years from the date of filing with, historically, no ability to renew or extend. Patent claims must be read purposively in light of the entire specification.

Trademarks find their origin in both common law and statute. Pursuant to the Trademarks Act,³ the holder of a registered trademark can take action against any person using the trademark or a confusingly similar trademark. A registered trademark may be enforced anywhere in Canada. A registered trademark holder is not required to establish goodwill or a reputation as a prerequisite for enforcement. This is not the case where a party relies on unregistered.

Infringement under the Trademarks Act is deemed to take place when a person sells, distributes or advertises goods or services in association with a confusing trademark. In determining whether the use of the trademark would be likely to lead to confusion, the Court will consider the following:

The inherent distinctiveness of the trademarks and the extent to which they have become known;

The length of time the trademarks have been in use;

The nature of the goods, services or business;

The nature of the trade; and

The degree of resemblance between the trademarks in appearance or sound or in the ideas suggested by them.

The Copyright Act⁴ prevents the unauthorized copying, performance or publication (where not already published) of original artistic, dramatic, musical and literary creations. Registration of copyright is not a prerequisite for enforcement but provides the registration holder with the presumption of

ownership and subsistence of copyright in any eventual enforcement proceedings.

In general, the term of copyright protection is the life of the author plus 50 years. Where the author is unknown, the term is restricted to the earlier of 75 years after the first publication of the work, or 100 years after which the work is made. In neither case is the term extendable or renewable.

It is an infringement of copyright for any person, without consent, to do anything that under the Copyright Act only the owner of the copyright has the right to do. As the set of rights varies depending on the precise type of work, what constitutes infringement varies from case to case. In general, infringement occurs where a party copies an original work or a substantial part thereof. There are a number of exceptions and defenses available, notably fair dealing for the purpose of research, private study, education, parody or satire.

References

1. *Turgeon D. Doing business in Canada 2022. Protection of Intellectual Property.* URL: <https://www.fasken.com/en/knowledge/doing-business-canada/2021/10/13-intellectual-property>.

2. *Understand the basics. Canadian Intellectual Property Office.* URL: <https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/what-intellectual-property/understand-basics>.

3. *Intellectual Property and Copyright.* URL: <https://www.canada.ca/en/services/business/ip.html>.