

# PATENTS:

## PROTECTING YOUR INVENTIONS

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## "PROTECTING YOUR INVENTIONS"

### Introduction

Anyone who invents something or improves something already in existence, or finds a new and better way of doing something, or who gives something an original, ornamental appearance, may obtain either a patent or an industrial design registration to protect that invention or design.

Very few inventions these days can be considered as "basic". The majority of patents cover improvements to existing products. A slight improvement may produce a new result, but there must be some ingenuity present before a patent will be granted.

It can be difficult to describe fully in words the character of a patentable invention. Often there is a "Why didn't I think of that?" quality about it. The experienced Patent Agent usually is able to advise whether or not this intangible quality is present.

Every country has its own patent laws. They all differ somewhat but all have the same object, namely to encourage technological progress by rewarding inventors with a limited monopoly. This means an exclusive right to control the manufacture, use or sale of the invention for a certain number of years in exchange for making it public. However, the patent monopoly does not take away from the public something that the public already enjoys. The very nature of a patent grant is for something new, something not available to the public.

This booklet is intended to give only brief and general information which applies to the majority of the leading countries of the free world, with the emphasis on the Canadian and United States patent systems. A qualified Patent Agent should always be consulted for specific advice relating to inventions and their protection.

## CHAPTER 1

### Some Reasons Why Prompt Patent Protection Should be Considered

If someone copies an idea patented by another, for personal use or sale, or buys it for resale (including importing it), the patentee or owner of the patent has the right to ask the Courts to order this infringement to cease. In addition the patentee or owner of the patent may request an accounting of profits or damages suffered through the unlawful use of the invention patented. Furthermore the infringing articles may also be ordered delivered up for destruction.

If an inventor does not obtain a patent on an invention, there is nothing to prevent other persons making or manufacturing this invention, or using it, or selling it on the open market. Furthermore, it is wise to act promptly in applying for a patent, since the Courts will not necessarily protect the inventor who has delayed too long in applying for protection.

Individuals are constantly working on new inventions and improvements to existing articles and processes. There have been many instances where people with practical ideas have made test models and tried them out successfully but have delayed applying for patents, thereby unintentionally allowing the inventions to fall into the public domain or perhaps losing them to another inventor who may apply for and obtain patent rights. If an invention has been made publicly available in any way at any time by someone other than the inventor, then it is too late to apply for a valid patent in Canada, unless it can be shown that the person who made the invention public learned of the invention either directly or indirectly from the inventor. Where that can be shown, or where the inventor personally has made the invention available to the public, a Canadian application must be filed within one year from the date when the public availability first occurred.

In the United States a patent application must be filed within one year of the first public use or sale of the invention in the United States and within one year from the first publication of the invention anywhere in the world.

If the application is not filed on time any patent which may issue is invalid. Therefore it is often not sufficient to be the first to think of a new device or mechanical idea and be able to prove it. In order to safeguard one's rights to a patent the inventor should apply for a patent as soon as possible. It is not necessary to build a model and test it for successful operation before applying for a patent. It is necessary to be satisfied that the invention is new, useful, and will function satisfactorily when built. You should also be satisfied that the invention has reasonable prospects for commercial adoption.

After the application has been filed at the Patent Office, a model can be constructed with the assistance of others if necessary. The filing of an application for patent at the Patent Office is known as "reduction to practice" and is considered to be legally equal to constructing a model.

It is wise to apply for a patent with the least possible delay. In Canada and most other countries, the first inventor to file an application for patent at the Patent Office will be granted a patent for the invention. An exception is the United States where the patent laws provide that the first person to make the invention is the one entitled to the patent. However, the first person to file an application for a patent in the Patent Office is presumed initially to be the first inventor and the burden of proving otherwise is upon the applicant who files later.

In any case, the person applying for a patent must be an inventor of the invention or someone who obtained rights to the invention legally from the inventor. Therefore, an inventor should not be too concerned about someone else stealing an invention. It is far more important to be concerned that someone else with as much inventive ability, working somewhere else, may think of the same thing independently and file his or her application first.

## CHAPTER 2

### Some Reasons Why the Services of a Registered Patent Agent Should Be Utilized<sup>1</sup>

It is recognized that an inventor will save time, expense, and continual uncertainty by utilizing the services of a registered patent agent in active practice. The work of preparation and prosecution of a patent application is highly technical. As the U.S. Supreme Court pointed out in the case of *Topliff vs. Topliff*:

The specification and claims of a patent, particularly if the invention be at all complicated, constitute one of the most difficult legal instruments to draw with accuracy, and in view of the fact that valuable inventions are often placed in the hands of inexperienced persons to prepare such specification and claims, it is a matter of no surprise that the latter frequently fail to describe with requisite certainty the invention of the patentee and err either in claiming that which the inventor has not in fact invented, or in omitting some element which was a valuable or essential part of his actual invention.

There is not much more to say when the highest Court in the United States has put it so clearly. While it may be possible for an inventor to persuade the examiner to allow some sort of patent without expert help, it is probable that the applicant will fail to obtain the full protection to which the invention should be entitled. Any unforeseen loopholes that exist will certainly be noticed by a Patent Agent acting for a competitor who is attempting to avoid the claims of the patent.

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<sup>1</sup> All Canadian Patent Agents are registered to practice by the Commissioner of Patents in Ottawa. The Patent Office is in Gatineau, Quebec just across the river from Ottawa.

## CHAPTER 3

### Patent Office Searches

An important part of a Patent Agent's practice consists of performing Patent Office searches, and studying and reporting upon the results. As well as performing searches for individual inventors, Patent Agents often do so for manufacturers, importers and the like. These manufacturers, importers and the like may have invented an item or they may have seen an item somewhere else, and may wish to know if it can be manufactured freely in Canada.

There are various types of searches which include preliminary novelty searches, infringement searches, or validity searches. The type of search to be made depends on the type of information that is being sought from the records at the Patent Office.

It should be pointed out that the Patent Offices in Canada, the United States and other countries constitute perhaps the largest repository of technological information available to the general public. This information may be of great assistance to the inventor. In many instances, as blind alleys can be avoided and partial solutions to problems obtained by having a technology search performed at the Patent Office. Although any prior published document may be relevant, patents have the advantage of being classified into different technological categories to provide for effective searching. Many other document sources are not classified in this manner, making it impractical to attempt a thorough search.

The most frequent form of search is the unofficial "preliminary" search, typically using databases of patents which are available for searching over the internet. In general, the best place to conduct this search is at the U.S. Patent Office. Although only patents available since about 1971 are available for keyword searching, older patents dating as far back as the early 1800's can still be viewed. The reason that a search of this type should be made in the United States is simply because more patents have issued in the United States than anywhere else - over seven million - and that the majority of patents at the United States Patent Office are available for searching over the internet. Even if the inventor does not plan to file an application in the United States, it must be realized that, for a valid Canadian patent to issue, the invention must be new everywhere, not just in Canada.

Under certain circumstances however, a Canadian search may be more appropriate when dealing with inventions in fields which are more developed in Canada than the United States. For example, patents for inventions relating to the sport of curling may be more numerous in Canada than in the U.S., where the sport is generally considered less popular, and patents for inventions applicable only in cold weather climates may have a greater likelihood of being applied for in Canada than in the United States. Also, when searching using internet databases, keyword searching is available for Canadian patents dating as far back as the early 1900's, which may be useful in fields where older patents may still be relevant to current innovations.

In some instances, it may be preferred to have a manual search conducted at the U.S. Patent Office through one's Canadian Patent Agent who utilizes an associate agent in the Washington area for this purpose. Manual searches at the Patent Office are useful when relevant prior art is expected which is not current enough to be searched using keywords on the U.S. Patent Office internet database.

The issued patents in both the Canadian and United States Patent Offices are arranged for searching under several thousands of classified headings and the art of preliminary searching by an experienced searcher includes locating the right classes or subclasses. The patents in the selected subclasses must then be individually studied. In a manual search, this is done in the public search room of the Patent Office used by hundreds of searchers daily, particularly in the United States.

Often, several people are searching in the same field at the same time or the class in question is being reclassified. Sometimes a reference is missing, either because it has been misplaced or because it has been removed. The United States Patent Office has in the past issued warnings to all searchers and registered agents that, because of the tremendous interest in certain technologies, the integrity of the classified records in the public search room had been destroyed by members of the public, who have access to the public search room, and who had removed patent copies from the records rather than taking the trouble to order copies from the publication branch. Security measures now in effect have considerably reduced these problems, but misplaced or missing copies do still occur.

Other problems arise when conducting searches using internet databases. When doing keyword searches, it is possible that some references are missed due to incomplete database records or misspelled keywords. More commonly, relevant prior art can be missed in an internet database search because keyword searching relies on the presence of specific keywords and many products or processes can be described using different descriptive language. A keyword search will only produce search results which match the particular words chosen to describe the invention as opposed to search results which have the same subject matter as occurs when searching manually by class as noted above.

Because of the above and other similar limitations, preliminary searches cannot possibly be as thorough as the official search made by the Examiners when patent applications are filed at the Patent Office. Nevertheless, many an idea thought to be new, is found not to be, when a preliminary search is made. Printed copies of all related patents found by the searcher will be sent to the inventor, for consideration and discussion with the Patent Agent.

While it is advisable to involve the services of a Patent Agent when conducting a preliminary search, many of the internet database are available free of charge and may be searched initially by the inventor before contacting a Patent Agent. Up to date links to many of the sites of interest are found at [www.adeco.com](http://www.adeco.com). Among the links available, the United States Patent and Trademark Office (USPTO) patent database found at [www.uspto.gov](http://www.uspto.gov) is one of the largest and more user friendly of the internet patent databases. This site is also relatively easy to use as the documents are extensively interlinked. More information about conducting your own patent search and links to other sites of interest are also available at [www.adeco.com](http://www.adeco.com).

## CHAPTER 4

### The Preparation of the Patent Application

An inventor wishing to apply for a patent should provide the Patent Agent with sketches, or a model, or photographs of a model. Occasionally, a written description is sufficient when the idea is relatively simple, but wherever possible, a sketch, picture or model is preferable. It does not matter if the drawing or model is somewhat crude or rough because all that is required is that the Patent Agent has a clear understanding of the invention. If some features are not sufficiently clear, the Agent can obtain clarification from the inventor. Dimensions and materials normally are not relevant in the preparation of a patent application, unless they are key to the invention's function or performance.

Depending on the type of application filed and the rules or requirements of the jurisdiction in which it is filed, a patent application may require special patent drawings drawn by a draftsman trained in their preparation. These are usually obtained by the patent Agent so that it is not necessary for an inventor to go to the expense of obtaining formal blueprints or other drawings prior to submission to the Patent Agent.

Patent drawings are made on regulation sheets of specific size, and differ from "shop drawings" or "blueprints" in a number of ways. They are not usually drawn to scale. In some cases parts of an invention in patent drawings may appear larger in relation to other parts to illustrate the inventive features as clearly as possible. Patent drawings emphasize the inventive, patentable features of the device, often at the expense of the illustration of common or well known parts. It may be necessary for people, not experts in the field, to clearly understand the invention: for example a Judge, in the event that the patentee may be seeking relief against an infringer. For all such reasons, the drawings generally should have a high standard of skill in execution.

### Claims

One of the most difficult tasks which the Patent Agent undertakes is the drafting of a set of claims. Each claim is, in a way, a patent in itself because each claim is an attempt to define an invention in a particular degree of detail. Claims are in effect "verbal blueprints" of the invention. Often a claim will define an invention only in terms of its structure and not its function.

The task of the Patent Agent is to draft claims which give the inventor the broadest coverage to which the invention is entitled, yet the claims must not be so broad as to encompass more than the applicant has in fact invented. Only by careful drafting of the claims can the full scope of protection to which the inventor is entitled be obtained. It must be remembered that the claims are the essence of the patent and they cannot be prepared and prosecuted without a great deal of skill and attention to detail.

### Description

The patent application must also contain a detailed description of the invention. This may be called the "disclosure" or the "specification". This part of the application sets forth the advantages of the invention over known devices or practices for the same or a similar purpose, and then a detailed description of the construction, method of operation and use of the invention. It is necessary to include anything essential to the construction or operation of the invention. The wording of the

disclosure should conform with that of the claims so that there can be no misunderstanding of the claims. An abstract is also required setting forth the invention in outline for a ready understanding of the subject matter by others once the patent has issued.

### Provisional Patent Applications

In Canada and the United States it is possible to file "provisional" patent applications. In Canada a "provisional" application is a normal application, but is filed incomplete, without all of the parts of a complete patent application. In the United States, special provisions have been included in the Patent Act to provide for a special category of patent applications defined as "provisional".

A provisional patent application is one that is filed as a temporary or interim measure to establish rights in an invention. It is usually filed with the minimum documentation required and at the least possible cost. The papers filed are not required to be in a particular format. While often advantageous to include, carefully worded claims that define the invention are not a filing requirement.

A provisional application is, by its very nature, temporary. It will not be examined by the Patent Office. In Canada it must be completed within fifteen months of the filing date or replaced by a complete application within one year of the filing date. In the United States, a provisional application must be replaced with a complete application within one year of the filing date. A replacement complete application in either Canada or the United States may claim the filing date of the original provisional application for subject matter common to the two applications.

## CHAPTER 5

### What happens when the Application is Filed At the Patent Office

When the inventor or applicant has checked over the patent specification for accuracy and signed the required documents, the Patent Agent will forward the application to the Patent Office (or Patent Offices if applications are being filed in more than one country). The day an application reaches the Patent Office will be its Filing Date<sup>2</sup> and it will also receive an application number. The inventor will be notified of these particulars when they are received by the Patent Agent. The application number should not be treated as a patent number. In Canada, applications filed after October 1, 1989 use the same number for both the application and the granted patent, but earlier filed applications do not. In the United States, the two numbers are different and the patent number will not be assigned until after the application has been officially allowed and the patent is about to issue.

### Prosecution of the Application

The inventor may now be said to have "patents pending" or "patents applied for". In Canada an application may remain in this state for up to five years, when the Patent Office will require the inventor to request examination. Examination may be requested at any time in this five year period. If it is not requested by the end of that period the application will become abandoned.

After a Canadian application has been pending for two years, maintenance fees must be paid to the Patent Office each year to keep the application and any patent granted on it in force.

Eighteen months after an application is filed, it will be possible for members of the public to inspect the application. If someone uses the invention without permission after that date, they may be required to pay reasonable compensation for the use of the invention once the patent issues. An applicant can also request early publication of the application to collect compensation from an infringer, upon issue of the patent, as of the date of early publication.

After a request for examination is made, the application will be scrutinized by an Examiner who is a specialist in that particular class of invention. After gaining an understanding of the invention, he will carefully study the claims. Having done this, he will attempt to find evidence of any earlier similar invention known to the public which meets the terms of the claims. This evidence may take the form of prior patents or publications anywhere in the world. The Examiner often has his own private search files as well as having access to the public search room records.

To the extent that he is able to discover such evidence, the examiner will reject, or require amendment of, all or some of the claims. This will involve further work upon the application by the Patent Agent who will either comply with the Examiner's requirement for amendment of the claims or argue against it.

Occasionally, an application will be approved with no need for amendment or argument. However, it is the Agent's purpose to obtain not merely a patent, but the broadest possible patent to which the

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<sup>2</sup> In Canada, patent documents such as applications may be sent through the Registered Mail Service of Canada Post, and **will** be considered received on the date stamped on the envelope by that service. The Patent Office will also receive documents by facsimile transmission.

invention is entitled, one that "fences in" as much novel territory as possible. To this end, the Patent Agent will normally draft at least one relatively broad claim for the purpose of learning what evidence the Examiner can find which may anticipate the claim. The Agent may then narrow the claim to the minimum extent necessary to avoid the earlier evidence thus endeavoring to obtain the best possible coverage to which the invention is entitled. Upon agreement being reached between the Patent Office Examiner and the Patent Agent, the application will be formally allowed by the Patent Office.

The issuing and printing fees will then be required by the Patent Office. After payment of these fees the patent will be issued.

In Canada and the United States, most patents now being granted have a maximum life of twenty years from the filing date of the application. Canadian patents granted on applications filed before October 1989 and still in force, and United States patents granted on applications filed before June 8, 1995, have a term of seventeen years from the date of issue of the patent or twenty years from the filing date of the application, whichever is longer. In Canada, the annual fees payable to keep an application in force must continue to be paid to keep a patent in force. In the United States, maintenance fees are payable at 3 ½, 7 ½ and 11 ½ years after the date of issue, in order to maintain the patent in force.

Also in Canada and the United States, one of two different fees scales is applicable in each country depending on the status of the applicant. The standard fee schedule generally applies to applications and patents where rights to the invention have been transferred or licensed to what is known as a "large entity". In Canada a large entity is an entity, other than a university, with more than fifty employees. In the United States a large entity is a company, including subsidiaries and related companies or organizations, having more than five hundred employees. An individual inventor or a small company is known as a "small entity" and is entitled to lesser fees in many instances. In the United States, non-profit organizations and certain other entities are also classified as "small entities".

It is important to keep the Patent Agent apprised of any completed or obligated transfer or license of rights from the inventor, as payment of small entity fees without proper entitlement to do so may jeopardize the validity of a patent. The Patent Agent will be in a situation to aid in determination of the appropriate fee scale using the prescribed small entity definition for the country in question.

While patent applications are pending, the entire record is kept secret for eighteen months from the earliest date from which the application claims some benefit. No one can obtain access to these records without written authority from the inventor or the Patent Agent appointed by the inventor. However once the application has been "laid open" in Canada and an application is published in the United States, copies are available and the entire record becomes open for inspection by any member of the public. Publication of applications in the United States applies only to applications filed as of November 29, 2000. Previously, application records in the United States were not made available to the public until issue of the patent.

## CHAPTER 6

### Kinds of Protection Available

Patents are granted for inventions relating to technical matters. These include:

- (1) articles, machines, and new constructions generally;
- (2) new chemical compositions or processes;
- (3) new methods or processes of doing something;
- (4) new biological products and processes.

It is also possible to protect the ornamental appearance of an article. This may be surface ornamentation or it may be the ornamental design or shape of an article. This form of protection is available in Canada as an Industrial Design Registration under the Industrial Design Act. In the United States, similar protection is available as a Design Patent.

Canadian Industrial Design Registrations protect the design for an initial period of five years. They are renewable for a further and final period of five years, providing a total of ten years. They must be applied for before the design has been publicly known for one year. In the United States, Design patents issue for fourteen years when the application has been allowed.

This kind of design protection is becoming increasingly important although the coverage is not the same as the coverage given by utility patents. However, so much depends upon the appearance of the design or "styling" of articles in commerce that greater attention is being given to this type of protection, often supplementing utility patent protection. However it can cover only the appearance or decorative features of an article and cannot cover the actual mechanical design.

Of further assistance in successful marketing is a well chosen trade mark, either a "word mark" or logo or a combination of both.

## CHAPTER 7

### Testing the Prospects of an Invention

Questions which every inventor should consider before applying for a patent may include:

- (a) Is the invention practical?
- (b) Does the invention do something more efficiently than is presently possible?
- (c) Will it cut production costs for a manufacturer?
- (d) Is there a sufficiently wide need for it?
- (e) Will the retail cost of it be low enough to attract a market?

The reactions of friends or others who are familiar with the field are also often well worth having and if thought advisable, such reactions can be obtained without disclosing the secret details of a construction. However in the final analysis, as in every successful venture, the inventor or applicant for a patent must make the decision and be willing to take the chance. The expense of seeking a patent is relatively low compared with the costs of going into a new competitive enterprise such as starting up a business.

It is not always the great inventions that prove most profitable during their patented term. The smaller ones, the practical and appealing, the slight improvements, are frequently the inventions most wanted by manufacturers. Generally speaking, relatively small improvements are faster money makers because the public is not as wary of them as it is about major new innovations. Manufacturers are aware of this and often prefer items that do not require expensive advertising to obtain public acceptance. In the case of large scale inventions, the original idea is often improved by the research department of the company marketing the invention so that it may well become a joint venture. In this case, the inventor can generally expect adequate rewards for his initial contribution.

Major developments are more likely to find acceptance today than in years gone by. We live in an age of such rapid advances in engineering and communication that new ideas do not meet the resistance they once did. A good example is the ready and wide acceptance of the computer, particularly the so-called "personal" computer for home and office use.

## CHAPTER 8

### The Union Convention for the Protection of Industrial Property

This treaty, which is commonly known as the "International Convention", is one to which most countries have subscribed.

The main purpose of this international agreement may be stated as follows:

If an application for a patent is first made in any single member country and then applications for the same invention are made in additional member countries, within twelve months thereafter, the applicant is considered as having filed his application in the additional countries on the date on which he filed in the first country. As an example, a Canadian citizen or resident may apply first in Canada. The same effective filing date may then be obtained in any other member country provided the foreign filing occurs within twelve months of the Canadian filing date.

However, an applicant may still apply for corresponding patents in other countries more than twelve months after the filing date of first application provided a patent has not yet issued from the first-filed application, and for most countries (Canada and United States are exceptions), no public use or sale or publication of the invention has occurred anywhere.

If, therefore, an inventor or applicant is interested in filing only in Canada, and/or the United States, limited use or disclosure may take place before filing (as mentioned in Chapter 1). If the inventor or applicant wishes to file in countries outside of Canada and the United States then it is in most cases essential that an application be filed in a convention country prior to first use or disclosure anywhere, as absolute novelty is a requirement in the majority of countries outside of Canada and the United States. For example if an application is filed in Canada and then a public disclosure is made of the invention, then most other applications outside of North America must be filed within twelve months of filing the first application. The inventor can then claim the first filing date as the effective filing date of the foreign application, which will pre-date the public disclosure of the invention.

## CHAPTER 9

### Other Considerations.

If two or more inventors have jointly made an invention, they all must be named as inventors on the patent application. Other names should not be listed as inventors, or the subsequently issued patent may be invalid. If an inventor believes that others may be joint inventors he should state the facts accurately to the Patent Agent in order that the matter may be handled correctly at the outset.

Sometimes the sole inventor has a backer who inadvertently may be named as a joint inventor. It is important that this question be settled initially. If the backer or backers desire to be "named", this can be done by assignment of part of the rights to the patent or by agreement between the inventor and his partners. This may include a syndicate or corporation formed to own the invention, or subsequent patent.

It is essential that such matters be discussed with your Patent Agent but care should be taken never to execute assignments of an invention or patent without clearly understanding the ramifications.

## CHAPTER 10

### Closing Comments

Some inventions are simple and others very complex. Sometimes a physically large invention is simple in construction while others may be quite small but complex. These differences influence the expense both of preparing applications and of prosecuting them after they reach the Patent Office. If, after the preliminary search has been undertaken, an inventor decides not to proceed, his drawings, model, photographs, and the like which were sent to the Patent Agent, will be returned upon request. Inventors in Canada may rest assured that any invention or material disclosed to a Registered Patent Agent will be received in confidence

It is useful for an inventor to keep accurate records and notes of the steps which have been taken during the formulation of the invention. Included should be the date that certain steps were taken, the names of any persons to whom detailed disclosure of the invention was made and the dates thereof and, if desired, a detailed description and sketches of the invention, dated and signed by two trustworthy persons, as having read and understood the invention. All of these records should be in ink and photocopies should be made. This gives an initial date of invention which can be used in the unlikely event that the inventor is required to prove his earliest date of invention. These steps can be taken prior to disclosure to the Patent Agent if desired although the Patent Agent's records will of course show a complete step by step procedure taken from the date of first disclosure through to the filing of the patent application.

A list of Registered Patent Agents may be obtained from the Canadian Patent Office.