COVID-19 Emergency Response Act and IP Rights

March 26, 2020

The COVID-19 Emergency Response Act received royal assent in Canada on March 25, 2020. It contains amendments to both the *Patent Act* and the *Food and Drugs Act*. These amendments are now the law.

Patent Act Amendments

The *Patent Act* amendments add to the section on the use of patents by government, providing a new compulsory licensing regime. Under new s. 19.4, the Commissioner of Patents shall authorize the Government of Canada as well as any person specified in the application to make, construct, use and sell a patented invention to the necessary extent in order to respond to the public health emergency described in the application. This language tracks s. 43 of the *Patent Act* with respect to the rights granted to a patentee. Such actions are specifically deemed not to be an infringement of the patent.

The application is to be made by the Minister of Health. Notice is to be provided to the patentee of any authorization granted. In addition, the information in the application must be provided.

The application must:

- Specify the name of the patentee and the patent number;
- Include a confirmation that the Chief Public Health Officer believes there is a public health emergency that is a matter of national concern;
- Include a description of the public health emergency; and
- Specify the person that to be authorized to construct, use and sell the patented invention for the purposes of responding to the public health emergency.

This type of compulsory licence can last a maximum of one year. It will cease to have effect on the earlier of the day the Minister of Health notifies the Commissioner that the authorization is no longer necessary to respond to the public health emergency listed in the application and one year after the day on which it is granted. Such authorizations are not transferrable.

The government and any person authorized shall pay what is termed as "adequate remuneration", taking into account the economic value of the authorization and the extent to which the patented invention is made, used, constructed or sold.

The Federal Court has also been granted the power to make an order on application of the patentee, requiring the government or any authorized person to cease making, constructing, using or selling the patented invention in a manner that is inconsistent with the authorization granted.

Compulsory licences of this sort can only be made until September 30, 2020. There are no provisions repealing this new power after that date.

Food and Drugs Act Amendments

A new regulatory power is being added to the *Food and Drugs Act* allowing regulations requiring persons to provide information to the Minister in respect of food, drugs, cosmetics or devices, or activities relating to these items, in circumstances other than those provided in the *Act*.

Furthermore, additional regulations can be made to the extent considered necessary for the purpose of preventing shortages of therapeutic products or alleviating those shortages or their effects, to protect human health.

These provisions are repealed, as of October 1, 2020.

BLG has created a COVID-19 Resource Centre to assist businesses on a variety of topics, including investment management, labour and employment, contractual risks, public disclosure requirements, education and criminal law. For advice with respect to Intellectual Property issues arising from COVID-19, please get in touch with the authors listed below who are ready and available to assist with navigating these unprecedented times.

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