

Written Submission for the Pre-Budget Consultations in Advance of the 2020 Budget

Submission to the
Standing Committee on Finance

August 2nd, 2019

Recommendation 1

That the federal government implement a First Patent Program in order to stimulate economic growth in Canada.

Recommendation 2

That the federal government create an intellectual property box (“IP Box”) tax incentive for income derived from intellectual property.

Recommendation 3

That the federal government adopt a “Simplified Procedure” of the existing RFA process to ensure a streamlined, efficient and cost-effective means of seizing and destroying shipments of counterfeit goods at our border.

Recommendation 4

That the federal government create statutory damages, payable by the importer of the counterfeit goods, to ease the burden of counterfeit cases on the courts and on brand owners.

Recommendation 5

That the federal government provide funding (or co-funding by requiring an administrative fee from all brand owners who register under the request for assistance program under Canada’s Combatting Counterfeit Products Program) to cover the costs of CBSA warehousing and destruction of counterfeit goods. This should be accompanied by clear direction from the federal government to CBSA to increase the seizures of counterfeit goods attempting to pass through our borders.

INTRODUCTION

The Intellectual Property Institute of Canada (IPIC) is the association of patent agents, trademark agents and lawyers practicing in all areas of intellectual property law. Our membership represents over 1,700 professionals, consisting of practitioners in law firms, agencies, sole practitioners, in-house corporate IP professionals, government personnel, and academics. Our members clients include virtually all Canadian businesses, universities, and other industries ranging from carbon capture technology to artificial intelligence, to winter jackets. Intellectual Property is therefore the backbone of innovation in Canada.

The scale of Canada's economic growth depends on our ability to encourage and reward innovative ideas, products and services that are created in our own backyard and around the world. IPIC has identified five recommendations that will develop and encourage economic growth within Canada, making our businesses more competitive, desirable to the global market, and successful.

Intellectual Property in Canada is already supporting climate change initiatives. The Canadian Intellectual Property Office (CIPO) has created a fast-track program for those seeking a patent for clean technology innovations.¹ In order to create an economy that is aligned with the importance of our current climate emergency and the required transition to a low carbon economy, clean technology innovations must have IP rights protected in order to succeed in the Canadian and global markets.

Through Budget 2020, Canada has the opportunity to be a world leader in intellectual property rights. The following recommendations will serve to empower small and medium-sized business owners, create employment growth, empower commercialization and better protections for all sectors, including clean technology innovations.

¹ Intellectual Property Office. "Speed up Your Patent Applications for Clean Technology Inventions." Canadian Intellectual Property Office. June 01, 2015. Accessed July 04, 2019. <https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr02462.html>.

IMPLEMENT A FIRST PATENT PROGRAM

CIPO has already made a commitment to environmental protection. Since 2011 CIPO has protected 390 'green' technologies through a fast-tracked patent application.² CIPO has also conducted research in respect of patented inventions related to climate change mitigation technologies. CIPO examined the level of patenting of high-value climate change mitigation technologies (CCMT) by Canadian businesses between 2008 and 2012 and concluded that high value innovation (HVI) businesses experienced 44% growth over the 2008-2012 period, increasing on average 13% annually.³

The University of Cambridge conducted a study that researched hundreds of new green technology companies in the US. The study confirmed the patenting activity of a start-up increases over 73% on average when it collaborates with a government agency. Laura Diaz Anadon, Professor of Climate Change Policy at the University of Cambridge stated: "Our findings suggest that some of the signs commonly used to track innovation and business success, such as patents and financing, increase when new cleantech companies' partner with US government departments or labs."⁴

The Office Economist of the United States Patent and Trademark Office (USPTO) recently studied the effect of a patent on 45,819 start-ups who filed their first patent application in the USPTO. The study confirmed that a patent allowance has a significant impact on start-ups, such as on sales growth (51%), employment growth (36%) and an improvement of the quality of subsequent innovations.

The Quebec government launched a new Innovation Program (Programme Innovation) similar to the proposed First Patent Program that provides Quebec-based companies with up to \$500 000 of financial assistance for the innovation of new products.⁵ These funds are applied towards investments in

² Intellectual Property Office. "Speed up Your Patent Applications for Clean Technology Inventions." Canadian Intellectual Property Office. June 01, 2015. Accessed July 04, 2019. <https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr02462.html>.

³ Intellectual Property Office. "Patented Inventions in Climate Change Mitigation Technologies." Canadian Intellectual Property Office. October 09, 2018. Accessed July 04, 2019. https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr04289.html#wb-tphp.

⁴ University of Cambridge. "Green tech startups see boost in patents and investment when partnering with government." ScienceDaily. www.sciencedaily.com/releases/2019/03/190318102407.htm (accessed July 4, 2019).

⁵ Paquette, Jean-Christophe. "New Program for Québec Companies Rewards Innovation with Financial Assistance: Smart & Biggar/Fetherstonhaugh." New Program for Québec Companies Rewards Innovation with Financial Assistance | Smart & Biggar/Fetherstonhaugh. January 24, 2019. Accessed July 04, 2019. http://www.smart-biggarr.ca/en/articles_detail.cfm?news_id=1515.

obtaining patents and developing IP strategies. The financial assistance provided by the Program can cover up to 50% of incurred expenses.⁶

IPIC recommends that the Government of Canada create a similar program in the 2020 Budget. The program would provide assistance to small and medium size businesses and start-ups that have developed an innovative idea and are in a position to seek patent protection but may not have the financial resources to do so. Intellectual Property agents often find after early stage consultations with Canadian businesses that they have patentable ideas and inventions without realizing it, and these inventions can have significant impacts on their innovation's success nationally and on the global market. The program would encourage qualified Canadian inventors and companies to file patent applications for inventions that provide the foundation of a successful venture. Furthermore, a First Patent Program would also benefit new clean technology companies.

Estimated Costs of the Program

- The rebate would cover 50% of patenting expenses. Such expenses would include patenting costs and professional fees incurred up to the patent's grant.
- IPIC suggests the maximum funding provided by the program (the 50% of expenses) should be \$25,000.
- IPIC estimates that there are currently about 600 to 800 applicants per year who file a first patent application.
- Therefore, if the program is successful in increasing the number of applications, we could use the figure of 1,000 applicants/year for financial estimates.
- The program cost would therefore be in the range of \$25 million plus administration costs.

CREATE AN INTELLECTUAL PROPERTY BOX ("IP BOX")

The federal government should consider creating an IP box model to provide favorable tax treatment for income derived from intellectual property.

The expression "IP Box" comes from a checkbox provided on tax forms to identify revenues that would be eligible for the reduced innovation tax rate.

⁶ Paquette, Jean-Christophe. "New Program for Québec Companies Rewards Innovation with Financial Assistance: Smart & Biggar/Fetherstonhaugh." New Program for Québec Companies Rewards Innovation with Financial Assistance | Smart & Biggar/Fetherstonhaugh. January 24, 2019. Accessed July 04, 2019. http://www.smart-biggars.ca/en/articles_detail.cfm?news_id=1515.

There is a distinction between R&D tax incentives and an IP box. R&D incentives support technology developments or input into the innovation process; conversely IP boxes support the output or commercialization of R&D. These incentives are complements and not substitutes, working together to improve both R&D activity and commercialization activity in Canada.

Quebec announced, in its 2016 budget, a similar patent box initiative that would lower corporate income tax from 11.8 to 4 percent, as of January 2017, on income that meets a number of criteria. Saskatchewan also introduced an IP Box tax incentive that reduces the corporate tax rate for eligible corporations to 6% for a period of 10 years on income derived from commercializing a broad range of intellectual property.

Cost Indicators

- In its 2016 Budget, the Quebec government estimated a cost of \$135 million over five years for its fiscal incentive.
- Statistics released in September 2017 by the UK Revenue and Customs department indicate that in 2014-15, the second year of the UK Patent Box, 1135 companies claimed the tax relief (up 37% over previous year), for a total value of £651.9 million. Canada must not risk falling too far behind in our ability to incentivize intellectual property commercialization.

ADOPT A SIMPLIFIED PROCEDURE FOR COUNTERFEIT GOODS SEIZED AT CANADIAN BORDERS

The Canadian Border Services Agency (CBSA) may detain shipments it suspects are counterfeit, but the current regime requires a trademark owner to obtain a court order or an executed written agreement in order for CBSA to release a shipment of detained goods.

The requirement to prosecute a civil action or conclude a written agreement with the importer to destroy counterfeit goods, together with the high storage costs, are a very real deterrent, discouraging trademark owners from filing Requests for Assistance in Canada. This compromises Canada's anti-counterfeiting efforts to the detriment of Canadian consumers and brand owners, in addition to damaging Canada's reputation around the world. Furthermore, enforcing trademark rights at the border while goods are under CBSA's supervision or control is far more efficient than having to enforce rights after the shipment has been released, or worse, entered the stream of commerce in Canada.

IPIC proposes a "simplified procedure" mechanism which would apply only to defined "counterfeit goods". This procedure resembles that set out in 2010 by the British Revenue and Customs Agency in the Goods Infringing Intellectual Property Rights Customs Regulations 2010. The procedure works as follows: suspended goods may be treated as abandoned for destruction where the rights holder has

informed Customs in writing within the specified period that it believes that those goods infringe an intellectual property right.⁷

IPIC recommends that, absent an objection by the importer within a set time from the date of notification by the CBSA of the proposed seizure of a shipment of goods which have been confirmed (in writing) by the trademark owner to be counterfeit, the goods will be forfeited to the Crown for destruction. Further, failure by the importer to object to the proposed forfeiture would be construed “deemed consent” to the forfeiture of the goods for destruction – similar to the unclaimed goods regime that current exists within the Customs Act and D4-1-5.

This “simplified procedure” would ensure a streamlined, efficient and cost-effective means of seizing and destroying shipments of counterfeit goods, thereby better protecting Canadian consumers and brand owners, while reducing the burden on Canadian courts and the CBSA.

Recommendation

That the federal government adopt a “Simplified Procedure” of the existing RFA process to ensure a streamlined, efficient and cost-effective means of seizing and destroying shipments of counterfeit goods at our border.

CREATION OF STATUTORY DAMAGES TO EASE THE BURDEN ON THE COURTS OF COUNTERFEIT CASES

The Canadian *Copyright Act* does contain some provisions relating to statutory damages, but nothing equivalent under the *Trademarks Act*. Through convention, the Federal Court of Canada as well as several provincial courts have adopted jurisprudence relating to minimum compensatory damages in cases where persons found to be responsible for dealing in counterfeit or pirated products are required to pay the minimum compensatory damage amount if they lack proper record-keeping to determine profits. If this convention could be incorporated into a meaningful provision on statutory damages covering situations involving counterfeit goods, there would be certainty in this aspect of brand protection for creators and owners of intellectual property in Canada.

It would also send a strong signal to pirates and counterfeiters who import illegal products that such activity will not be tolerated. The issue of statutory damages for counterfeit goods is one that has been addressed by many members of the intellectual property community, including sitting judges of some of our Courts. The overall sense is that statutory damages would make it easier for judges to deal with these cases and greatly reduce court costs, leaving more resources available for the other business of our Courts. As counterfeiting increases and more court cases are instituted to deal with even small cases

⁷ Wilson, David, and Rachel Montagnon. "HMRC Issues New "simplified Procedure" for the Seizure and Destruction of Goods Infringing Intellectual Property Rights." Lexology. March 09, 2010. Accessed July 04, 2019. <https://www.lexology.com/library/detail.aspx?g=bfe5a124-f11e-47f3-90d2-4d27b6f97a1c>.

the burden on our judicial system resources will increase. The implementation of this amendment will streamline these cases and make them less burdensome on all parties.

Recommendation:

That Canada implement legislation requiring an importer of counterfeit or pirated goods to pay statutory damages, the amounts to be determined by taking into account the existing realities of cost and awards by our Courts.

FUNDING FOR CBSA WAREHOUSING AND DESTRUCTION OF COUNTERFEIT GOODS

Suspected counterfeit or pirated goods that have been the subject matter of the existing limited number of detention cases in Canada have illustrated the importance and necessity of better funding for dealing with the importation of counterfeit goods into Canada. In the majority of existing cases, the cost of storage and destruction has ultimately been paid by the importer after an agreement is reached with the brand owner; however, in many cases the importer abandons the shipment, resulting in the intellectual property rights holder having to cover the costs of warehousing and destruction. If disputes resulting in legal action begin, the costs of warehousing for the IP rights holder can be significant.

Shipments would be more economically dealt with by a system like the US system that allows the border services agency, upon receipt of uncontradicted proof that the goods in question are infringing, to quickly destroy the goods while storage costs are still at an insignificant level. On the other hand, in situations when cases are opposed by an importer or legal action has been commenced in Canadian Courts, the matter can be dealt with through the existing process.

The US Customs and Border Protection Agency [reported having seized](#) over 33,000 shipments of counterfeit goods in 2018, over 6,000 of which were related to fashion and accessories. By comparison, Canada's Border Services Agency have only detained less than 100 shipments over the last four years. Due to the lack of federal funding for warehousing and destruction, low cost goods are most often released, even after being confirmed as counterfeit by brand owners.

In the end it appears clear that a significant increase in seizures or detentions utilizing a better funded model will provide Canada with a much more effective and internationally recognized program of border enforcement for counterfeit and pirated goods. Implementation of this recommendation will acknowledge the increase in counterfeiting activity in Canada as well as globally and provide more effective border enforcement in a cost-effective manner.

Cost Estimate:

- 1000 counterfeit shipment seizures per year*
- \$1000 on average for warehousing and destruction per shipment
- 2500 registrations under the RFA program

- \$200/RFA registration (\$500,000/2years)

*Assumption based on a clear mandate given to CBSA to increase seizures of shipments of counterfeit goods. US CBP reported ~33,000 seizures in 2018.

Recommendation

That the federal government provide funding (or co-funding through an administrative fee from all trademark owners) to cover the costs of CBSA warehousing and destruction of counterfeit goods. This should be accompanied by clear direction from the federal government to CBSA to increase the seizures of counterfeit goods attempting to pass through our borders.

IPIC recommends federal funding start at \$4 Million (\$1 million/year, 4 years). Alternatively, under a co-funding model with brand owners who register for the request for assistance program, IPIC recommends that federal funding be provided of \$3 million (\$750,000/year) and brand owner funding (\$500,000/2years).

CONCLUSION AND REQUEST TO APPEAR BEFORE THE COMMITTEE

IPIC would highly value an opportunity to appear before the committee and present testimony about these recommendations and further expand on the how strong IP policies can help support climate change initiatives through innovation and growth in clean technology sectors.

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