



HOUSE OF COMMONS  
CHAMBRE DES COMMUNES  
CANADA

## **INTELLECTUAL PROPERTY REGIME IN CANADA**

### **Report of the Standing Committee on Industry, Science and Technology**

**David Sweet, M.P.  
Chair**

**MARCH 2013**

**41st PARLIAMENT, FIRST SESSION**

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## **Report of the Standing Committee on Industry, Science and Technology**

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# **THE STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY**

has the honour to present its

## **THIRD REPORT**

Pursuant to its mandate under Standing Order 108(2), the Committee has studied the Intellectual Property Regime in Canada and has agreed to report the following:



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# THE CANADIAN INTELLECTUAL PROPERTY REGIME

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## BACKGROUND

On May 1, 2012, pursuant to Standing Order 108(2), the Standing Committee on Industry, Science and Technology (hereafter “the Committee”) adopted a motion to study the intellectual property (hereafter “IP”) regime in Canada and how this regime contributes to advancing innovation.<sup>1</sup> The Committee heard from 50 witnesses over the course of the hearings, which began on May 10, 2012 and concluded on February 5, 2013.

As global competition increases, and as Canada’s population (and workforce) ages, it becomes very important to find ways to increase labour productivity if Canada is to maintain its high standard of living. It is through innovation that Canadians will achieve productivity growth, and numerous recent studies have supported this assertion.<sup>2</sup> The Conference Board of Canada defines “innovation” as:

a process through which economic or social value is extracted from knowledge — through the creation, diffusion, and transformation of ideas — to produce new or improved products, services, or processes.<sup>3</sup>

With regard to Canada’s current innovation performance, Rob Annan (Director, Policy, Research and Evaluation, Mitacs) provided the following:<sup>4</sup>

The challenge, of course (...), is that Canada suffers from a lack of productivity related to poor innovation. We have below average [Business Enterprise Expenditure on Research and Development] spending, we’re in the bottom third of PhD graduates per capita, and we’re 14th out of 17 OECD countries in terms of patents produced per population. But we do have exceptional output from our research universities. We’re 10th in the world in per capita academic publications. We’re even higher in some areas; we’re world leaders in things like life sciences. Our universities are among the highest ranked in the world.

Jeremy de Beer (Associate Professor, Faculty of Law, University of Ottawa) tied together IP and innovation in helping protect prosperity by stating that Canada needs “to focus on innovation, because innovation is the key to enhancing productivity. There is a role for the IP system to play here.”<sup>5</sup> Given the importance of innovation for Canada’s

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1 This motion was also amended by the Committee on May 3 and June 7, 2012.

2 For example, see [\*Innovation Canada: A Call to Action\*](#), the final report of the Review of Federal Support to Research and Development, also known as the “Jenkins Report.”

3 Conference Board of Canada, Centre for Business Innovation, *Innovation Defined*, <http://www.conferenceboard.ca/cbi/innovation.aspx>.

4 Rob Annan (Director, Policy, Research and Evaluation, Mitacs), [\*Evidence\*](#), June 19, 2012, 0910.

5 Jeremy de Beer (Associate Professor, Faculty of Law, University of Ottawa, As an Individual), [\*Evidence\*](#), May 15, 2012, 1005.

future, the role that IP plays in helping ensure Canada is a high innovation performer becomes very important for all stakeholders.

This report aims to identify the key elements of the Committee's study of Canada's IP regime, and proposes recommendations to the Government of Canada about how to improve this regime as it relates to improving innovation and productivity. Chapter I of this report presents background information about IP and describes elements of Canada's current IP landscape. Chapter II addresses the need for further education and awareness about IP among Canadian small and medium-sized enterprises (hereafter "SMEs"). Chapter III provides information about the benefits and challenges of university-industry-government collaboration with regard to managing IP. Chapter IV examines avenues to strengthen and streamline the intellectual property process in Canada. Chapter V investigates ways to render the fight against counterfeiting and piracy more effective. Chapter VI briefly examines the IP regime as it relates to the specifics of the Canadian pharmaceutical sector. Finally, Chapter VII provides the Committee's recommendations to the Government of Canada.

## CHAPTER I — THE CURRENT INTELLECTUAL PROPERTY LANDSCAPE

### 1. Understanding Intellectual Property

Intellectual Property (IP) is defined by the Canadian Intellectual Property Office (hereafter “CIPO”) as:

Legal rights that result from intellectual activity in the industrial, scientific, literary and artistic fields.<sup>6</sup>

The following key elements are included in the broader IP categorization:<sup>7</sup>

- **Patents:** Patents cover new inventions (process, machine, manufacture, composition of matter), or any new and useful improvement of an existing invention.
- **Trade-marks:** Trade-marks are unique identifiers that give exclusive rights to words, symbols and designs to distinguish goods or services in the marketplace.
- **Copyrights:** Copyright means the right to copy; only the copyright owner can produce, reproduce, or grant permission to others to do so.
- **Industrial Design:** An industrial design relates to the shape, configuration, pattern or ornament (or any combination of these features) applied to a finished article made by hand, tool or machine.
- **Integrated Circuit Topographies:** Integrated Circuit Topographies are innovative three-dimensional circuit designs. IP protection with respect to integrated circuit topographies provides exclusive rights over the copying of the topography and the commercialization of circuits that contain the topography.

At the federal level, the above elements are covered by five pieces of legislation, each addressing a particular type of IP:<sup>8</sup>

- the *Patent Act*;

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6 Canadian Intellectual Property Office, Learn about IP, [http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h\\_wr00011.html](http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr00011.html).

7 Ibid.

8 Osler, Hoskin and Harcourt LLP, *Protecting Intellectual Property in Canada*, p. 63, [http://www.osler.com/uploadedFiles/News\\_and\\_Resources/Publications/Guides/Doing\\_Business\\_in\\_Canada\\_-\\_2011/DBIC-Chapter13.pdf](http://www.osler.com/uploadedFiles/News_and_Resources/Publications/Guides/Doing_Business_in_Canada_-_2011/DBIC-Chapter13.pdf).

- the *Trade-marks Act*,
- the *Copyright Act*,
- the *Industrial Design Act*; and
- the *Integrated Circuit Topography Act*.

These Acts are administered by CIPO, which is an agency of Industry Canada, whereas the *Copyright Act* is a shared responsibility with Canadian Heritage.<sup>9</sup> The *Plant Breeders' Rights Act* is also considered to be part of the IP regime in Canada and is administered by the Canadian Food Inspection Agency.

## **2. The Role of the Federal Government**

### **A. Industry Canada**

Industry Canada is responsible for developing and managing the Government of Canada's IP policy framework. Officials within the department's Strategic Policy Sector provide the Minister of Industry with policy advice on all aspects of IP, and represent the Government of Canada in international forums and various international negotiations.<sup>10</sup>

According to Gerard Peets (Senior Director, Strategy and Planning Directorate, Strategic Policy Sector, Industry Canada), the objectives of the IP framework are to spur innovation, creativity and the dissemination of knowledge. Mr. Peets further explained to the Committee how the following three factors affect policy development within the IP framework:<sup>11</sup>

- IP matters now more than ever before. For firms in the Standard & Poor's 500 index in 2008, intangible assets (such as IP) made up 70% of a firm's asset value (up from 20% in 1975); thus, it is easy to understand how valuable IP is in today's economy. Also, the value of patents is showcased by recent major financial transactions, such as the \$4.5 billion sale of Nortel patents in 2011, and Google's \$12 billion acquisition of Motorola in 2012.
- Domestic IP policy is also global IP policy. Even though IP rights are provided for under domestic laws, trading nations have been working towards broad consensus in a number of areas. Norms and standards

9 Ibid.

10 Gerard Peets (Senior Director, Strategy and Planning Directorate, Strategic Policy Sector, Industry Canada), [Evidence](#), May 10, 2012, 0845.

11 Ibid.

have been developed, and are enshrined in the World Trade Organization's Trade-related Aspects of Intellectual Property Rights agreement, to which Canada is a signatory. Similarly, Canada is also a member of the World Intellectual Property Organization (hereafter "WIPO"), a consensus-building body of the United Nations.

- IP is a very complex policy area:
  - IP policy exists as one policy that supports innovation amongst a suite of other policies. For example, competition policy is also very important to ensuring an innovative and productive economy.
  - IP policy affects many stakeholder groups, some of whom hold conflicting positions with regard to what Canada's IP regime should be.

Mr. Peets also informed the Committee that going forward, the Government of Canada is looking to assess how the current IP regime addresses the following policy concerns:

- Are patents currently serving Canadians well? How are innovation and competition affected by defensive "patent portfolios," "patent trolls" and "patent thickets?"<sup>12</sup>
- For exporters, are foreign IP patent regimes more important than that of Canada?
- As the vast majority of Canadian businesses are SMEs, how well are they served by the IP regime?
- Does Canada need to examine how IP is administered or enforced in courts of law?

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12 Patent trolls and patent thickets are explained later in this report.

## B. The Role of the Canadian Intellectual Property Office (CIPO)

CIPO is responsible for the administration of the IP regime in Canada. CIPO examines applications for IP rights, and grants or registers those rights to successful applicants. The Office also manages the first appeals process, through the Trade-marks Opposition Board<sup>13</sup> and the Patent Appeal Board.<sup>14,15</sup> CIPO is also responsible for improving the awareness of IP amongst Canadian businesses, and represents Canada at WIPO.

Given Canada's relatively small consumer market, with regard to applying to formally protect inventors' IP rights, Canada is considered a country of "second filing." Consequently, CIPO undertakes efforts to ensure the Canadian system is compatible with those found in other jurisdictions, particularly places of "first filing" such as the United States and the European Union. According to CIPO's CEO Sylvain Laporte:<sup>16</sup>

Clearly IP is a global play, particularly with respect to its administration. From an administration perspective, it is essential for us to be well plugged in to other countries and that we spend a great deal of effort harmonizing our intellectual property activities so that it's a lot easier for Canadians to file abroad and a lot easier for foreigners to file in Canada. If that balance is not well achieved, it doesn't make Canadian companies very competitive and it makes it hard for foreigners to invest in Canada.

Table 1 shows the IP activity that CIPO reported for the 2011-2012 fiscal year. CIPO receives approximately 100,000 applications for IP rights, of which 37,000 are for patents. (In 2011-2012, CIPO granted 20,911 patents.) Of these patent applications, only 12% are from Canadians; the remaining 88% are from foreign applicants.

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13 Trade-marks Opposition Board, [www.ic.gc.ca/eic/site/cipointernet-internettopic.nsf/eng/h\\_wr00120.html](http://www.ic.gc.ca/eic/site/cipointernet-internettopic.nsf/eng/h_wr00120.html).

14 Patent Appeal Board, [http://www.ic.gc.ca/eic/site/cipointernet-internettopic.nsf/eng/h\\_wr01955.html](http://www.ic.gc.ca/eic/site/cipointernet-internettopic.nsf/eng/h_wr01955.html).

15 Sylvain Laporte (Commissioner of Patents, Registrar of Trade-marks and Chief Executive Officer, Canadian Intellectual Property Office), [Evidence](#), May 10, 2012, 0850.

16 Ibid.

**Table 1 — Canadian Intellectual Property Office IP Volumes by Type (2011-2012)**

	Patents	Trade-marks	Industrial Designs	Copyright
<b>Applications</b>	36,926	49,495	5,170	8,212
<b>Grants/Registrations</b>	20,911	26,783	4,640	8,167
<b>Time from filing to grant/registration</b>	78 Months	27 Months	9 Months	3 Days

Source: Canadian Intellectual Property Office, *Presentation to the Committee*, May 7, 2012.

The contributions of CIPO to innovation and the assistance it provides to Canadian industry are described below:<sup>17</sup>

- Providing a decision on IP rights in a timely manner: the sooner CIPO can provide a decision regarding an application, the sooner businesses can prepare for going to market.
- Distilling the “scope” of a patent application down to the essence of the innovation, to ensure that this scope is well-defined; the lack of such clarity can lead to litigation.
- Helping ensure the public disclosure element of IP is undertaken. Public disclosure can be used by other innovators. Incremental innovation occurs when someone takes a patented concept, alters it and obtains a different patent, which leads to new opportunities for commercialization. This situation is made possible because of the patent holder’s obligation to disclose the protected technology to the public.

CIPO is responsible for assessing patent applications against the *Patent Act* and the *Patent Rules*. As the head of CIPO, the Commissioner of Patents is authorized to grant patents for inventions that meet the test for “patentability,” which means an invention must be new, useful and unobvious.<sup>18</sup> With respect to the granting of patents, CIPO has the following strategic objectives:<sup>19</sup>

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17 Ibid.

18 Industry Canada, “Written Response to Questions Posed by the Standing Committee on Industry, Science and Technology (INDU),” February 5, 2013.

19 Ibid.

- Timely granting of IP rights and reducing “red tape” to allow inventors to quickly develop, monetize and commercialize their ideas to facilitate quick market access;
- Granting high-quality and clearly scoped patents to support business investment by increasing certainty in the market;
- Maintaining a searchable database of granted patents to support the diffusion of information to facilitate incremental innovation;
- Aligning CIPO practices with international IP norms and standards to help Canadian companies compete globally by providing a cost-effective way to obtain reliable, high quality patent rights in multiple jurisdictions; and
- Raising awareness and providing education about intellectual property to encourage inventors to protect their patents and assist them in better exploiting them.

### C. Legal Framework of the Patent System<sup>20</sup>

The *Patent Act* (hereafter “the Act”) provides the legal framework for patent law in Canada. The Act, its associated regulations, and the related jurisprudence provide the requirements that are to be met in order for the Commissioner of Patents to grant a patent.

Under the *Patent Act*, there are no statutory damages and no criminal penalties for patent infringement.<sup>21</sup> In contrast, infringements of trade-marks and copyright could be subject to criminal sanctions under the *Criminal Code* and the *Copyright Act*. Patent disputes are therefore generally a private matter; courts hear patent validity challenges or infringement claims at the request of individuals or corporations. The Federal Court of Canada (hereafter “FCC”) serves as the main litigation forum for patent cases. Decisions of the FCC may be appealed to the Federal Court of Appeal and further to the Supreme Court of Canada. Although patents disputes are generally a private matter, government departments or agencies may get involved under certain circumstances:<sup>22</sup>

...the FCC will hear appeals from decisions of the Commissioner [of Patents] denying a patent application (called a judicial review) and in these cases, the Commissioner is a party to the court proceedings and is represented by the Attorney General of Canada.

<sup>20</sup> This section is based on the information provided to the Committee by Industry Canada in the document “Written Response to Questions Posed by the Standing Committee on Industry, Science and Technology (INDU)”, February 5, 2013.

<sup>21</sup> There are however specific exceptions under the Act where criminal sanctions may apply.

<sup>22</sup> Industry Canada, “Written Response to Questions Posed by The Standing Committee on Industry, Science and Technology (INDU)”, February 5, 2013.

The relative number of IP cases before the FCC is declining. In 2008, 24.6% of cases before the FCC were IP-related, whereas this share fell to 18.6% of cases in 2012. Among the IP cases before the FCC in 2012, 47% were related to trade-marks, 37% were related to patents, and 12% were related to copyrights.

Prior to reaching the courts, some methods exist for challenging the validity of a patent, both before and after a patent is granted by the Commissioner of Patents:<sup>23</sup>

First, before a patent is granted, a third party has the opportunity to prevent its issuance by either the filing of prior art or initiating a protest. (...)

After a patent is granted, it may be challenged by any person through a request for a re-examination or a patent impeachment action. A request for re-examination is filed with the Commissioner of Patents and must include printed publications that call into question the novelty and non-obviousness of the patented invention. The request is assessed by an internal Re-Examination Board appointed by the Commissioner of Patents to consider the case and if it is found that the request raises a substantial new question affecting the patentability of a claim in the application, the board will notify the patentee. The patentee is then given a chance to respond and/or propose amendments to the patent.

### **3. Intellectual Property: Providing Incentives to Innovate**

Regulations and laws related to IP protection aim to strike a balance between providing firms an incentive to innovate and promoting a competitive marketplace. One way to mitigate any negative effects of an IP regime on competition is to oblige the patentee to release publicly details of the invention so that others in the industry can take advantage of the invention through licensing agreements during the term of the patent, or profit freely from it at the end of the patent term. The obligation for the patentee to release details of the invention early in the patenting process is, in fact, a key component of most IP regimes, including Canada's. Therefore, a well-balanced IP regime aims to provide the incentive to innovate along with the efficient sharing of information, which in turn allows incremental innovation to take place. Consider the testimony of Gerard Peets from Industry Canada.<sup>24</sup>

IP is a marketplace framework that aims to spur innovation and creativity, and this is done largely by granting exclusive economic rights. It's also about supporting the dissemination of knowledge. For example, inventors who file patents not only receive rights over their invention, but also consent to their publication. It also recognizes that follow-on innovation is beneficial and useful. The IP regime sets out the terms under which a person can make use of a rights holder's creation or invention.

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23 Ibid.

24 Gerard Peets (Senior Director, Strategy and Planning Directorate, Strategic Policy Sector, Industry Canada), [Evidence](#), May 10, 2012, 0900.

Gail Garland (President and Chief Executive Officer, Ontario Bioscience Innovation Organization), also supported this point by stating the following:<sup>25</sup>

Our view in the human health technology and bioscience industry is that the role of intellectual property is to protect inventions and encourage inventors so that we can commercialize technology here and allow companies to stay here and grow here. Then we as Canadians can reap the economic benefit.

Others, such as Ruth Corbin (Managing Partner and Chief Executive Officer, CorbinPartners Inc.), also see the importance of IP for innovation, stating that, “Innovation is our most precious national resource, but intellectual property is what it takes to manage, govern and organize it.”<sup>26</sup> Furthermore, Mark Eisen (President, Intellectual Property Institute of Canada), suggested that since IP rights lead to innovation, and since innovation leads to increased employment in the economy, this activity should be “funded to some degree at the taxpayer(s’) expense, because (it) results directly in jobs.”<sup>27</sup>

Some witnesses went deeper into the discussion about the importance of IP, explaining the life cycle of invention-innovation-commercialization-commoditization, and its effects upon the market. Tom Brzustowski (Retired professor, Telfer School of Management, University of Ottawa, As an Individual) explained how market forces such as competition help to eventually transform most innovations into common commodities; eventually, as a consequence, firms can charge only the price the market will allow for a particular product. Although this is good for consumers, it can greatly reduce the revenue for the businesses that commercialized the invention. A good IP regime allows the innovator/business to recoup R&D, marketing and production costs, and also make a profit which can then be used to commercialize their next innovation.<sup>28</sup> Mr. Brzustowski further provided the following example of a newly created entity whose principal goal is to commercialize an invention born of university research:<sup>29</sup>

In this case, the Intellectual Property that the new firm owns is its major and perhaps only asset. Everything else has to be acquired with funds that have yet to be raised. The new venture is a very small business, short of both time and money, and a strong patent is essential to convince investors that the invention has a real prospect of creating new value and to attract investment for the costs of commercialization. This is urgent. For a research-based new venture a strong first patent obtained early on may open the door to growth and success.

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25 Gail Garland (President and Chief Executive Officer, Ontario Bioscience Innovation Organization), [Evidence](#), October 4, 2012, 1140.

26 Ruth Corbin (Managing Partner and Chief Executive Officer, CorbinPartners Inc., As an individual), [Evidence](#), May 15, 2012, 0900.

27 Mark Eisen (President, Intellectual Property Institute of Canada), [Evidence](#), May 15, 2012, 1005.

28 Tom Brzustowski (Retired Professor, Telfer School of Management, University of Ottawa, As an Individual), [Evidence](#), November 6, 2012, 1205.

29 Ibid.

In contrast, some witnesses questioned the relationship between IP rights and innovation, suggesting that the mere existence of a strong IP rights framework does not necessarily lead to further innovation. For example, Jeremy de Beer stated that strong IP rights may only spur innovation in certain sectors but not in others; furthermore, in some cases, the mere “stockpiling” of IP rights may no longer be a viable business model.<sup>30</sup> Additionally, Ian Hargreaves (Professor of Digital Economy, Cardiff University), stated the following:<sup>31</sup>

There is certainly evidence that some use of patents is designed primarily not in the pursuit of invention and innovation but designed in defence of existing marketplace positions of one kind or another, some of them more distantly related to innovation and substance than others.

Some witnesses also questioned the relevance of using the number of patents a country generates as a key measure of innovation performance. For example, international studies such as those conducted by the Organization for Economic Co-Operation and Development (hereafter “OECD”) cite the number of patents a country produces as part of the assessment of that country’s innovation performance. Further to this point, witnesses cited the importance of gathering sound evidence in measuring Canadian IP-related performance. For example, Ruth Corbin noted that Canada could benefit from an innovation “measurement directorate” that could help determine whether or not Canada is succeeding in its efforts at improving innovation performance. Jeremy de Beer further elaborated upon the importance of adapting the methods and the metrics used to assess Canadian IP and innovation policies, especially considering its implications in international studies and rankings:<sup>32</sup>

IP outputs are a substantial part of the formula that many organizations currently use to evaluate Canadian innovation. Intellectual property outputs form one quarter of the weighting of our D grade in innovation. That’s attributable to our poor statistical performance in acquiring certain kinds of IP rights. Unfortunately, the formula wrongly presumes that IP outputs indicate innovation. Innovation and invention are not the same thing. A true innovation has market value. A patented invention may or may not.

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30        Jeremy de Beer (Associate Professor, Faculty of Law, University of Ottawa, As an individual), [Evidence](#), May 15, 2012, 0905.

31        Ian Hargreaves (Professor of Digital Economy, Cardiff University, As an individual), [Evidence](#), June 12, 2012, 0900.

32        Jeremy de Beer (Associate Professor, Faculty of Law, University of Ottawa As an individual), [Evidence](#), May 15, 2012, 0905.

## CHAPTER II — INCREASING AWARENESS OF THE INTELLECTUAL PROPERTY REGIME AMONG CANADIANS

### 1. Lack of Awareness of the Intellectual Property Regime among Canadians and the Need for “Intellectual Property Strategic Thinking”

Many witnesses commented that Canadians and, in particular, Canadian SMEs, appear to have limited awareness about the role and importance of IP. Notably, Mark Eisen stated that “there is a very low awareness about intellectual property among SMEs in Canada. We need to engage the public and educate them on IP.”<sup>33</sup> Morgan Elliott (Director, Government Relations, Research In Motion) also made a similar point:<sup>34</sup>

In 2008 CIPO came out with a great study that said 80% of businesses knew what a patent was, but they didn't know what intellectual property was, nor did they think their business had any intellectual property. A lot of it is an education process, understanding that knowledge and the things you produce, not just hard goods, are valuable.

Additionally, businesses need to have better IP “strategic thinking,” including considering changes to corporate governance structures to force additional thought and planning around IP. For example, Avvey Peters (Vice-President, External Relations, Communitech) also noted that although in Canada small businesses are important drivers of the economy, they do a poor job of “strategically managing their intellectual property assets.”<sup>35</sup> Some suggested there could be a role for the Government of Canada to play in this regard.<sup>36</sup>

I would invite government to think about (...) how to influence the culture of corporate governance in businesses. Government and business have been partners for a long time, yet surprisingly their intellectual property agendas are moving in different directions.

Some witnesses pointed to evidence that suggests that merely pursuing patents and other IP rights for the sake of collecting them may not be in the best interests of all companies, especially SMEs. Consider the data presented by Catherine Beaudry (Associate Professor, Department of Mathematical and Industrial Engineering, École Polytechnique de Montréal), which shows how small Canadian biotechnology companies with fewer than 50 employees are less likely to survive if they attempt to acquire more patents after a certain threshold amount; Ms. Beaudry concluded that these data clearly shows the importance of support mechanisms for Canadian SMEs applying for IP protection.

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33 Mark Eisen (President, Intellectual Property Institute of Canada), [Evidence](#), May 15, 2012, 0855.

34 Morgan Elliott (Director, Government Relations, Research In Motion), [Evidence](#), October 23, 2012, 1230.

35 Avvey Peters (Vice-President, External Relations, Communitech), [Evidence](#), June 19, 2012, 0855.

36 Ruth Corbin (Managing Partner and Chief Executive Officer, CorbinPartners Inc., As an individual), [Evidence](#), May 15, 2012, 0900.

## 2. How to Better Educate Canadians about Intellectual Property

The study's witnesses had no shortage of suggestions for ways in which to address this lack of awareness about IP. Although many witnesses acknowledged the work of CIPO in helping to better inform Canadian researchers and businesses about the importance of IP, they also expressed that more could be done in this regard. Consider the testimony of Mark Eisen:<sup>37</sup>

There has to be a concerted effort to actually educate the public on the uses and benefits of intellectual property and to dispel many of the misconceptions that are out there. (...) However, CIPO needs to have the budget to be able to do this as well. There is a marketing issue here. If people aren't aware of the system, they will not be using it.

Many witnesses stated there is little government support for companies trying to manage the daunting IP process. Rami Abielmona (Vice-President, Research and Engineering, Larus Technologies Corporation) spoke of the National Research Council Canada's Industrial Research Assistance Program (hereafter "IRAP"), which manages the Accelerated Review Process; this program "supports Canadian companies when making the decisions to patent or not."<sup>38</sup> Such support is particularly important for SMEs, especially those looking to file for patents in foreign jurisdictions. Mr. Abielmona also agreed that increased IRAP funding targeted at helping inform SMEs about the importance of IP would be beneficial to Canadian industry.<sup>39</sup>

Dave Waters (Advisor, Government, Industry and Academic Advisory Council, Startup Canada) also showed support for additional IRAP-administered IP training for SMEs:<sup>40</sup>

Secondly, we think regional community programs should be required to educate entrepreneurs about the risks and rewards of effective IP protection and some of the links entrepreneurs can get then (*sic*) into programs like IRAP or the National Research Council regional institutions that can help them develop and protect their intellectual property.

Additionally, Jeremy de Beer stated that the "key thing the government can do is provide awareness, training, and research to support the private sector to better manage their intellectual property rights."<sup>41</sup> The Canadian International Council has also suggested that Canada could benefit from creating the position of an "IP Czar" who would have

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37 Mark Eisen (President, Intellectual Property Institute of Canada), [Evidence](#), May 15, 2012, 0855.

38 Rami Abielmona, (Vice-President, Research and Engineering, Larus Technologies Corporation), [Evidence](#), November 1, 2012, 1100.

39 Ibid.

40 Dave Waters (Advisor, Government, Industry and Academic Advisory Council, Startup Canada), [Evidence](#), October 25, 2012, 1145.

41 Jeremy de Beer (Associate Professor, Faculty of Law, University of Ottawa, As an individual), [Evidence](#), May 15, 2012, 0925.

an expanded role compared to that of the head of CIPO. This individual would be a high-level IP champion reporting directly to the Prime Minister, who could help promote the importance of IP in the private sector and how it needs to be managed like other key assets.<sup>42</sup>

Mr. de Beer also noted a recent initiative by the Department of Foreign Affairs and International Trade, in which several trade commissioners received training about IP; given these officials will be working with Canadian businesses looking to export their products, this initiative will help firms better understand the importance of sound IP management.

Some witnesses, such as Ruth Corbin, suggested that IP management should be on the agendas of Canada's business schools; and, the federal government should co-ordinate with provincial securities regulatory bodies about educating Canadian public corporations about IP management, citing how this practice has been effective for those businesses that have chosen to do so. Ms. Corbin also added the following:<sup>43</sup>

Bring it to the attention of regulators so that when they advise businesses, corporate governors, and directors with liability about what they have to do to mitigate the risks to their corporations according to such and such standards, they will understand that the risk management of intellectual property is one of the standards.

### **3. The Labour Supply of Registered Patent Agents**

According to Erica Fraser of Dalhousie University, there appears to be a shortage of registered patent agents in Canada, a situation that causes many challenges for Canadian businesses and researchers, and may contribute to the lack of awareness about the importance of IP. This shortage of IP personnel is particularly acute in areas outside major urban centres such as Vancouver, Toronto, Ottawa and Montreal. Ms. Fraser went on to state that the federal government (in particular, CIPO) could greatly help in this regard by helping to promote and support this very challenging profession, so that there will be more IP professionals to work with Canadian inventors.

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42 Karen Mazurkewich (Director, Intellectual Property, Canadian International Council), [Evidence](#), October 2, 2012, 1145. See also Canadian International Council [Rights and Rents: Why Canada Must Harness Its Intellectual Property Resources](#), p.16.

43 Ruth Corbin (Managing Partner and Chief Executive Officer, CorbinPartners Inc., As an individual), [Evidence](#), May 15, 2012, 1015.

## **CHAPTER III — UNIVERSITY-INDUSTRY-GOVERNMENT PARTNERSHIPS**

Many witnesses spoke of the importance of collaboration in the innovation life-cycle, given that the sharing of ideas is an important way to develop new and better ways of doing things of value. Witnesses also addressed the challenges and benefits of collaboration among the public, academic and business sectors, with various perspectives on the role IP rights play in such scenarios.

### **1. University-Industry Partnerships**

University-industry collaboration received much attention during the study, principally because Canadian post-secondary institutions are noted for having very strong research and knowledge creation capabilities.

However, many witnesses acknowledged that universities may not be the best vehicles for commercializing these discoveries, given their primary mandates are teaching and conducting research. In contrast, businesses are created to commercialize goods and services. Hence, industry-academy collaboration can take advantage of each partner's complementary skill-sets. The challenge, however, is to create and manage knowledge-transfer and partnership policies that are in the best interests of all parties involved.

#### **A. Universities and the Pursuit of Commercial Opportunities**

Gay Yuyitung (Business Development Manager, McMaster Industry Liaison Office, McMaster University) explained some of the challenges universities face when trying to commercialize their discoveries; namely, the earlier the stage a technology is in its development, the more risks it faces, in terms of technical and marketing considerations. Ms. Yuyitung also stated the following:<sup>44</sup>

In general, given the university's small patent budgets and the high cost of drafting and prosecuting patent applications, as well as the long time to issuance of such patents in the Canadian system, very few patents can be supported by the university on its own.

Furthermore, this situation causes academic institutions more complications in further stages of the technology's development, as many government funding programs linked to commercialization require the applicant to have IP protection. Ms. Yuyitung went on to add the following:<sup>45</sup>

The current practice of McMaster University is to initiate patent filings. But without a source of additional funding, be it an industrial partner, investor, or granting agency, many applications become abandoned before commercialization is realized. (...) This can result in stifling the development of truly innovative products, or causing many of these

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44 Gay Yuyitung (Business Development Manager, McMaster Industry Liaison Office, McMaster University), [Evidence](#), May 17, 2012, 0845.

45 Ibid.

innovative ideas to be sold early to large multinationals, with limited benefit to the Canadian economy.

Chris Lumb (Chief Executive Officer, TEC Edmonton) stated that the nature of university research often renders it unsuitable for commercialization since it may be too early-stage or experimental. Moreover, Mr. Lumb also noted that Canadian universities generate negligible revenue from the royalties on IP compared to the vast sums they invest in research activities. Avvey Peters also supported this notion, stating that although “universities and colleges are an important producer of IP in Canada, they (are) by far the minority source of commercial opportunity.”<sup>46</sup>

Mr. Lumb also discussed the resulting spin-off companies that may be created after successful academy-industry collaboration. Technology accelerators, such as TEC Edmonton, aim to assist researchers in assessing whether or not their idea is suitable for commercialization. If so, they work with the inventors to help them plan the most efficient and economical business practice to do so, whether it is to licence their discovery for use by an existing company, or to create a new venture to exploit it. If the researchers decide to create a spinoff entity, TEC Edmonton provides support services to that end, such as negotiating additional laboratory access with the university, so as to avoid costly capital investments for research space and equipment, for example. Mr. Lumb added that the University of Alberta supports this approach, and that many successful spin-offs have been born out of this system.

In some cases, the university culture itself may contribute to the lack of commercialization of in-house research. Given their primary functions are teaching and conducting research, universities may not allocate significant resources to patenting inventions or to the commercialization of discoveries. To that point, George Dixon (Vice-President, Research, University of Waterloo), argued that universities have to create a climate that helps students and academics recognize when their research has potential commercial applications, what is required to protect their discoveries, and where they can go for assistance in these areas. Additionally, Chris Lumb suggested that what was most important for such institutions was to help create a culture of commercialization within them; in this way, researchers will be motivated to either seek ways to commercialize their discoveries themselves, or seek industry partners to help them do so. Lastly, witnesses warned of some of the negative effects that stem from ignoring commercialization opportunities arising from discoveries within the academic environment. For example, Douglas Barber (Distinguished Professor-in-Residence, McMaster University) offered the following:<sup>47</sup>

(The) culture of commerce in Canada is very weak. It is poor. We are at the top in our investment in the knowledge of our people, and not matched by any other country, but

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46 Avvey Peters (Vice-President, External Relations, Communitech), [Evidence](#), June 19, 2012, 0855.

47 Douglas Barber (Distinguished Professor-in-Residence, McMaster University, As an Individual), [Evidence](#), October 25, 2012, 1200.

when it comes to creating value from that knowledge, we're close to the bottom of the list. There is something really wrong. What is it? Well, it's about our culture, and our culture is what we believe to be important and what we believe to be true, and it doesn't have to be conscious for us to carry it on. (...)

Our culture is largely shaped by post-secondary learning, and the post-secondary learning environment is commerce-averse. "Customer" is a bad word, "sales" is a bad word, "commerce" is a bad word, and "profits" is a really bad word. The 18- to 25-year-olds, who are pretty easily influenced at that stage, are influenced in that kind of an environment.

Mr. Barber noted that if commercialization within the academic setting is not viewed in a favourable light, it is possible that students who go on to join the professoriate may also view commercialization this way, and thus, continue to maintain this culture in Canada's post-secondary institutions.

## **B. Effective Partnership Agreements and Lessons from Successful University-Industry Collaborative Models**

A principal challenge with university-industry collaboration is trying to establish a mutually beneficial partnership agreement, including how to manage the related IP. To this point, Avvey Peters noted that notwithstanding the many positive aspects of university-industry collaboration, companies can sometimes find it challenging to create suitable partnership agreements with academic institutions. This position was also supported by David Harris Kolada (Vice-President, Corporate and Market Development, Sustainable Development Canada), who noted that "universities have inconsistent IP licensing rules, which are quite difficult to navigate, and that has inhibited the commercialization of clean technologies out of those environments."<sup>48</sup> Furthermore, John McDougall (President, National Research Council Canada) observed that some academics may over-value the importance of the technological component of their discoveries in relation to all the other elements of a collaborative commercialization effort; consequently, this lack of understanding can lead to conflict when negotiating partnership agreements with potential industry partners.

The Committee learned that Canada's post-secondary institutions do not have a consistent, standardized IP ownership policy, which, in part, may contribute to the challenges of industry-academic collaborations. The University of Waterloo, for example, has in place a researcher-owned IP policy (40% of Canadian universities have a form of inventor-owned IP).<sup>49</sup> Other institutions use a variation of an institution-owned IP policy,<sup>50</sup>

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48 David Harris Kolada (Vice-President, Corporate and Market Development, Sustainable Development Canada), [Evidence](#), June 19, 2012, 0905.

49 Scott Inwood (Director, Commercialization, University of Waterloo), [Evidence](#), May 17, 2012, 0850.

50 Ibid.

with some institutions (e.g., the University of Manitoba) employing a “50-50” inventor-institution IP ownership policy.<sup>51</sup>

It should be noted that throughout the study, there was no consensus regarding which type of IP-ownership model was best suited for Canadian post-secondary institutions. One witness, Catherine Beaudry, stated the following:<sup>52</sup>

On the number of patents that the different universities have, we find no impact depending on the incentive structures they have, such as depending on whether the IP belongs entirely to the professor, or whether the IP belongs to the university or it's shared, and as for who pays for the patenting or whatever, we find no difference.

Also, despite much testimony related to the challenges posed to collaboration because of inconsistent IP policies, many witnesses suggested that Canada is best served by the flexibility of allowing universities to develop IP policies that best worked in their specific environments. A potential compromise of these two positions was offered by Karen Mazurkewich (Director, Intellectual Property, Canadian International Council):<sup>53</sup>

Let's find some more standardized legal agreements that could be used across the universities, maybe through some template clauses, to simplify things at the stage where industry comes in with the universities and starts meeting and negotiating some of these agreements, rather than trying to get all the universities to change the rules.

Some witnesses, such as Erica Fraser acknowledged that there are federal programs in place to encourage university-industry collaboration, but they also noted that such programs do not offer any funding to help protect the IP that may evolve from such collaboration. Further to the point, Ms. Fraser recommended the following:<sup>54</sup>

If there were IP funding available to help with the protection of those technologies and those innovations developed through collaborative research, I think that would go a long way to helping companies work with the university even further to bring those innovations to market.

Some witnesses offered examples of how their organizations contribute to improving the collaborative efforts between universities and businesses. For example, George Dixon explained that at the University of Waterloo, students are given training on how to better contribute in the workplace prior to their first co-op placement; another training module is on the importance of IP.

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51 Digvir Jayas (Vice-President, Research and International, University of Manitoba, [Evidence](#), May 17, 2012, 0945.

52 Catherine Beaudry (Associate Professor, Department of Mathematical and Industrial Engineering, École Polytechnique de Montréal, As an Individual), [Evidence](#), May 17, 2012, 0935.

53 Karen Mazurkewich (Director, Intellectual Property, Canadian International Council), [Evidence](#), October 2, 2012, 1125.

54 Erica Fraser (Manager, Technology Commercialization, Engineering/Sciences, Industry Liaison and Innovation, Dalhousie University), [Evidence](#), June 12, 2012, 0945.

A further challenge associated with this type of collaboration stems from the fact that the industry partner is looking to commercialize research or an invention created by the academic partner. However, the research/invention in question may not be born of a demand in the market; thus, part of the commercialization effort includes having to “push” this new discovery into the market. Rob Annan cited the challenges of such “research push” based commercialization efforts, including the fact that the partners may not each clearly understand or agree upon the value of the research or invention during its early stages:<sup>55</sup>

Currently the model for collaboration largely focuses on the commercialization of university discoveries through licensing or other IP transfer agreements. This generally occurs through tech transfer offices marketing university-produced IP to businesses. This research push approach creates challenges, especially where inventors and businesses may disagree over the value of early-stage research discoveries.

In contrast to “research push” collaborations, some institutions, such as Mitacs, promote “a demand-driven industry pull approach to research, where companies with a specific research need can seek to access academic expertise, which may involve some university IP.”<sup>56</sup> Mitacs is an independent organization that helps support industry-academic research collaboration. According to Mr. Annan, in a typical Mitacs partnership, a company is either seeking to apply academic research/invention to solve a market or business demand, or is seeking to apply academic expertise to an existing business invention. Moreover, in the Mitacs model, the industry partner keeps any commercial rights resulting from the collaboration, whereas the academic partner retains the IP rights not directly tied to the partnership (usually those resulting from their original research). Rarely do Mitacs projects result in new or “novel” IP, given that collaboration is usually initiated closer to the commercialization end of the innovation continuum. Mr. Annan concluded that managing the IP in such partnerships is less complicated than in a “research push” approach, given that the IP’s value is easier for both parties to determine from the outset. Nobina Robinson (Chief Executive Officer, Polytechnics Canada) also supported this approach:<sup>57</sup>

In Canada, we have muddled all this up, ascribing similar motivations to widely different players. For some reason, for 20 years now, we've bet billions annually that game changing innovations discovered in university labs can simply be pushed out on to industry for commercial exploitation. As other witnesses have told you, the returns on this investment simply aren't there and likely never will be. In reality, industry and its customers identify problems (...) They generate demand for R&D. We need more support for market pull.

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55 Rob Annan (Director, Policy, Research and Evaluation, Mitacs), [Evidence](#), June 19, 2012, 0910. Additional information about Mitacs's mandate, structure, programs, and funding can be found at [www.mitacs.ca](http://www.mitacs.ca).

56 Ibid.

57 Nobina Robinson (Chief Executive Officer, Polytechnics Canada), [Evidence](#), November 6, 2012, 1150.

Ms. Robinson also noted that although universities can provide research expertise to assist industry to further innovation, it is also true that Canada's "colleges and polytechnics engage students in industry innovation, enabling Canadian SMEs to speed their ideas to market."<sup>58</sup> Avvey Peters stated that "organizations like Mitacs that can broker those good, solid partnerships between a business and a university and help make those connections are good ways to advance IP."<sup>59</sup>

Once industry and academics are able to find one another and agree to establish a partnership, there are various approaches that can be taken in terms of the nature of the collaboration, including the management of the IP. For example, the Committee learned of the approach taken by the Consortium for Research and Innovation in Aerospace in Quebec (hereafter "CRIAQ"), as regards collaboration:<sup>60</sup>

(...) the background IP belongs to the original owner. (...) if it's required for the project it's put forward, but it still belongs to the owner at the end. (...)The foreground IP is owned by the project partners. The key item now is that the universities have agreed to give the industrial partners — you see it there — an exclusive worldwide royalty-free licence for aerospace applications, or, more accurately, applications in the field of interest of the industrial members, which are mainly aerospace.

Other witnesses spoke of the benefits of the CRIAQ approach, especially with respect to their standardized partnership agreements. Lucie Boily (Vice-President, Policy and Competitiveness, Aerospace Industries Association of Canada) indicated that this approach allows industries and universities to begin their collaborative work sooner, given the partners do not have to waste time on lengthy negotiations over IP management.

Additional witnesses explained the particularities of their approaches to collaboration. For instance, Chris Lumb explained different models of IP sharing with regard to academic-industry partnerships.<sup>61</sup>

The goals in setting it up TEC Edmonton were to focus on creating more spinoffs and on licensing locally and regionally in preference to licensing internationally, on the basis that if the university could license locally, it would create more spinoffs. It wouldn't really be forgoing any licence revenue because universities don't generate very much anyway, but in the long run it would create more new economic activity in the region, and that would link the university to the region better.

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58 Ibid.

59 Avvey Peters (Vice-President, External Relations, Communitech), [Evidence](#), June 19, 2012, 0935.

60 Clément Fortin (President and Chief Executive Officer, Consortium for Research and Innovation in Aerospace in Québec), [Evidence](#), June 19, 2012, 0900.

61 Chris Lumb (Chief Executive Officer, TEC Edmonton), [Evidence](#), October 23, 2012, 1105.

Describing another type of partnership structure, Pierre Meulien (President and Chief Executive Officer, Genome Canada) stated the following:<sup>62</sup>

That is the approach taken by the Structural Genomics Consortium, for example, of which Genome Canada is a foundational funder. The SGC is one of the largest-ever public-private research partnerships, representing more than 200 scientists working in labs ranging from university labs to some of the largest pharmaceutical labs in the world, all of whom openly share their early-stage results. The goal is to speed novel and effective drug discovery by identifying suitable molecular targets in a high throughput mode. The result is a new approach to intellectual property rights that allows drug makers and university scientists to share risks and reduce costs at a stage of research deemed precompetitive by the stakeholders.

Mr. Meulien offered an example of yet another type of arrangement regarding collaboration in the “precompetitive space.” Participants from either the public or private sectors share knowledge across a number of groups, having previously agreed to refrain from filing for IP rights on the common research resources. This approach lets researchers share risks in the daunting early stages of invention, while also creating more data than would be accomplished were the research to be solely conducted by individuals. Afterwards, participants are permitted to patent whatever they generate on their own, using the research obtained collaboratively.

It should be noted that some witnesses also commented that industry-academic collaborative efforts should not be solely judged by their commercial success; these partnerships also provide secondary benefits such as the scientific learning that takes place during R&D, the business experience a researcher may acquire, and additional economic activity. For example, Mr. Meulien cited a recent Genome Canada policy brief that examined these additional advantages:<sup>63</sup>

The authors are leading experts in intellectual property, technology transfer, and public policy. They argue that commercial success alone is inadequate to measure intangible assets such as the scientific knowledge, entrepreneurial experience, and industry collaboration that are necessary ingredients for economic growth.

## **2. Industry-Government Partnerships**

### **A. The Climate for Commercialization in Canada**

During the course of this study, several Committee members asked witnesses about what changes to Canada’s IP regime would be required to create and support more globally competitive, highly successful Canadian multi-national companies. As stated earlier, many witnesses commented that Canadian companies and post-secondary

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62 Pierre Meulien (President and Chief Executive Officer, Genome Canada), [Evidence](#), October 23, 2012, 1115.

63 Please see Genome Canada, [Moving Beyond Commercialization: Strategies to Maximize the Economic and Social Impact of Genomics Research](#), April 2012.

institutions were very strong at invention, but poor at commercializing those inventions. Consequently, many Canadian “IP-rich” companies are acquired by foreign firms, who then successfully commercialize the acquired IP. According to Karen Mazurkewich, “foreign companies that snap up Canadian start-ups favour those with IP assets; in fact, 66% of the IP that was sold as part of Canadian mergers and acquisitions deals between 2005 and 2009 went to firms outside this country.”<sup>64</sup>

Part of this phenomenon stems from what many witnesses referred to as the “valley of death,” which is the difficult, risky transition along the innovation continuum from invention to commercialization.<sup>65</sup> This phase presents many potential challenges to firms who must: develop a strategy to market their invention (determine to whom it could be targeted, and in what way); convince industry and/or consumers to be early adopters of a novel product or service; and, try to stay financially viable during a period of little or no revenue. Karen Mazurkewich commented that in addition to the fact that Canadian companies with valuable IP are being acquired by foreign firms, it should be noted that Canada cedes more IP than it acquires. This phenomenon of “IP flight” is also due, in part, to the willingness of Canadian firms to join foreign companies in order to access larger global markets, and thus allow their inventions to have a greater chance of success.<sup>66</sup>

Another factor leading to this IP flight phenomenon, according to many witnesses, is the lack of suitable venture capital and other financing vehicles in Canada. On that point, for example, Tony Stajcer (Vice-President, Corporate Research and Development, COM DEV International Ltd.) stated the following:<sup>67</sup>

There isn't enough funding to maintain that development to get to a point where you can really see the high commercial value. We have some funding and we struggle along, and then we need to continue funding to develop that IP internally, and there's a lack of it. I think that's also partly why some of that IP leaves.

Others stated that this condition should be of concern to the Government of Canada, and that “further focus on supporting small and medium companies to bridge the valley of death will ensure that Canada reaps the benefits of IP developed in this country.”<sup>68</sup> Witnesses also acknowledged the efforts of the federal government in this area, but also spoke of the importance of further investment. Morgan Elliott of Research in Motion stated that “good initiatives have been announced to strengthen the program

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64 Karen Mazurkewich (Director, Intellectual Property, Canadian International Council), [Evidence](#), October 2, 2012, 1100.

65 Lianne Ing (Vice-President, Bubble Technology Industries Inc.), [Evidence](#), June 12, 2012, (0930).

66 Tony Stajcer (Vice-President, Corporate Research and Development, COM DEV International Ltd.), [Evidence](#), October 2, 2012, 1150.

67 Ibid.

68 Lianne Ing (Vice-President, Bubble Technology Industries Inc.), [Evidence](#), June 12, 2012, 0930.

supports for innovative-based SMEs and to generate more venture capital funding, and we agree with those, but the job is not done.”<sup>69</sup>

## B. Intellectual Property Policies of Government Programs related to the Aerospace Industry

Over the course of the study, the Committee heard from witnesses regarding the Canadian aerospace industry, and the IP policies of related government programs, such as procurement and the Strategic Aerospace and Defence Initiative (hereafter “SADI”). Tony Stajcer stated the following:<sup>70</sup>

There are inconsistent IP rules across the different types of funding mechanisms. This is one of the problems. If you go after one fund, you have one set of problems; if you go after another one, you have another set of problems. It takes a long time to negotiate issues.

Additionally, representatives of the Aerospace Industries Association of Canada (hereafter “AIAC”) testified to the following:<sup>71</sup>

- Aerospace is global in nature: Canadian companies often collaborate with foreign subsidiaries and suppliers; thus, aerospace R&D efforts are not always best suited to being 100% conducted within Canada.
- R&D in a SADI-funded project must be performed in Canada, making it difficult for Canadian companies to exploit the industrial comparative advantages of other jurisdictions.
- SADI’s current IP policy hinders commercialization efforts by foreign firms operating in Canada, as they do not have the right to use the technology (funded by a SADI contribution agreement) outside of Canada.

The Government does not acquire the IP from a foreign company for the procurement of a foreign aircraft; some say this is a disadvantage because the high-skill, high-technology, value-added work often stays with the foreign company.<sup>72</sup>

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69 Morgan Elliott (Director, Government Relations, Research In Motion), [Evidence](#), October 23, 2012, 1120.

70 Tony Stajcer (Vice-President, Corporate Research and Development, COM DEV International Ltd.), [Evidence](#), October 2, 2012, 1120.

71 Lucie Boily (Vice-President, Policy and Competitiveness) and Maryse Harvey (Vice-President, Public Affairs), Aerospace Industries Association of Canada, [Evidence](#), October 2, 2012, 1110.

72 Lucie Boily (Vice-President, Policy and Competitiveness, Aerospace Industries Association of Canada), [Evidence](#), October 2, 2012, 1110.

AIAC offered some suggestions as to how to address these challenges; specifically:<sup>73</sup>

- In general, it would benefit the Canadian aerospace industry if there were consistent IP policies across all government departments, along with fewer restrictions regarding how the IP can be used.
- With regard to programs such as SADI, IP policies should be more flexible to allow for foreign collaboration, when appropriate.
- With regard to aircraft procurement, the Government of Canada should strengthen procurement policies by negotiating IP rights from foreign suppliers, which could allow Canadian companies to compete on some of the high-value components involved with complex, multi-stage procurement projects. The Association contends that the economic benefits in Canada of such procurement might double if the federal government also acquired the IP.

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73 Ibid., 1135, and Maryse Harvey (Vice-President, Public Affairs, Aerospace Industries Association of Canada), [Evidence](#), October 2, 2012, 1220.

## **CHAPTER IV — STRENGTHENING AND STREAMLINING THE INTELLECTUAL PROPERTY PROTECTION PROCESS IN CANADA**

The process for obtaining IP rights can be defined as the process through which such rights (i.e., patents, trade-marks, copyrights, etc.) are granted by a governing authority. Discussions on strengthening and streamlining this process in Canada can be separated between “general” and “specific” matters. The “general” matters relate to the discussion about high-level concepts of what should be the key underlying principles of the IP rights process in Canada; the “specific” matters focus on particular aspects and procedures that could be modified in order to improve this process.

### **1. Policy Principles: The Big Picture**

Jeremy de Beer commented that the overarching principles of IP policies should be to increase certainty and reduce transaction costs. Transaction costs are defined, in the context of property rights, as “the costs (of) establishing and maintaining property rights.”<sup>74</sup> Similarly, in the context of IP, transaction costs can be defined as the costs of establishing and maintaining IP rights. IP protection entails transaction costs for patentees. Transaction costs include research, administrative and enforcement expenses that fall on creators and innovators. Transaction costs can also be in the form of legal fees for patentees if their patents are challenged in court. These costs directly offset the potential rewards provided by IP rights protection, and need to be carefully assessed by innovators and creators. It can therefore be said that the larger the transaction costs within a given IP regime, the lower the incentive to innovate.

Regarding the issue of certainty, granting questionable patents (i.e., those that are likely to invite a court challenge) increases risks for the patent holder. These risks take the form, for example, of a higher probability of costly litigation. These potential costs translate into businesses assigning a greater risk premium to investments in development projects, which, again, reduce the potential reward provided by IP protection. Mark Eisen alluded to the uncertainty problem by saying that applicants for IP protection do not know what to expect from the government agency (responsible for granting IP rights) when applications are examined, and second, from the courts if these rights are subject to legal dispute. Similarly, Gail Garland stressed the importance of predictability to attract investments for commercializing technologies: businesses need to know that they will have market exclusivity for a period of time and they do not want to waste any of this time defending patents in court. Karna Gupta (President and Chief Executive Officer, Information Technology Association of Canada) also noted that while longer patent protection terms

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74 Douglas W. Allen (Professor of Economics, Simon Fraser University), “What are Transaction Costs?” *Research in Law and Economics*, vol. 14 (0), p. 1-18, (1991) <http://encyclo.findlaw.com/0740book.pdf>.

may be an element of the picture, he also stressed the importance of predictability as it relates to enforceability:<sup>75</sup>

The big piece that also ties with this is the enforceability. If you are going to have a patent, you should be able to enforce it if there is an infringement. So that process needs to be dealt with as well. You can't just say having your patent length increased from 17 to 20 or 25 years is going to draw an investment. There are other issues that play into it.

Hence, the greater the uncertainty within a given IP regime, the lesser the incentive to innovate.

Transaction costs and uncertainty are therefore critical factors when considering whether to enhance IP protection. An increase in IP protection is often justified on the grounds of increasing the business incentive to innovate, innovation being a key driver of productivity and economic prosperity.

However, to the extent that enhanced IP protection can lead to higher transaction costs and cause more uncertainty, enhancing IP protection could be self-defeating as it could lead to lower investments in innovation — even if it initially leads to a higher number of patents being issued:<sup>76</sup>

Statistics suggest that nearly half of issued patents are invalidated when they're challenged in court. That creates work for lawyers and bureaucrats, but in fact impedes innovation. Low-quality patents can contribute to the proliferation of thickets, create uncertainty, and lead to anti-competitive practices that stifle innovation. The narrow focus on quantity, not quality, also naively implies that to induce innovation we need only increase IP protection, which could in fact make matters worse. I submit that we need a more sophisticated analysis...

As noted earlier, witnesses indicated that policy must be made in light of sound evidence. Jeremy de Beer observed that actual business practices and real-world impact in specific sectors need to be thoroughly documented in order to create effective policies. Ian Hargreaves, for his part, noted that some patents do not further innovation, but rather sometimes simply protect a market position. Mr. Hargreaves also suggested that extending copyrights for too long a period does not make economic sense. In the same vein, Richard Gold (Professor, Faculty of Law, McGill University, As an Individual) asserted that there is little evidence supporting the notion that granting greater IP rights or longer protection terms would increase innovation in Canada. He further noted that such a move would, in fact, simply result in an increase in transaction costs, which would, in turn, impede collaboration.

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75 Karna Gupta (President and Chief Executive Officer, Information Technology Association of Canada), [Evidence](#), November 1, 2012, 1220.

76 Jeremy de Beer (Associate Professor, Faculty of Law, University of Ottawa, As an Individual), [Evidence](#), May 15, 2012, 0910.

The policy considerations illustrated in the preceding paragraphs have implications in terms of strengthening and streamlining the IP protection process. Strengthening and streamlining the IP protection process should not be interpreted as increasing IP protection or allowing for a less rigorous approach in the granting of IP rights. Rather, strengthening and streamlining the IP protection process should be interpreted in the context of reducing transaction costs and increasing certainty, thereby making the IP protection process more efficient.

Except in specific cases or sectors, such as pharmaceutical patents and trade-mark protection (addressed in separate chapters in this report), no witnesses suggested that Canada needs to overhaul the entire IP regime. However, specific recommendations or comments as to how this process could be made more efficient were numerous.

## **2. Specific Issues**

### **A. The Canadian Intellectual Property Regime: The Accessibility Issue**

#### **i. The Problem: Cost and Time of Filing and Defending Patents**

Several witnesses testified that the cost and time associated with filing for IP protection and defending patents represent major barriers for businesses to participate in the Canadian IP regime. Mark Eisen noted that the Scientific Research and Experimental Development (SR&ED) Tax Incentive Program provides tax credits for eligible research activities, up to the point of determining that an invention is patentable. According to Mr. Eisen, often, the small business reaction is to question whether having a patent is warranted given that it is so expensive to obtain and, potentially, to defend.

Similarly, David Harris Kolada indicated that his organization conducted an in-house survey of more than 220 firms in the “clean technology” sector, including questions about IP. One of the key conclusions from this survey is that the cost to patent and defend IP, regardless of its origin, is high and the timelines involved are lengthy.

Douglas Barber stated that patents are “a legal means of providing monopoly status to the inventor or the owner of the information. In that sense, patents provide a legal right to fight when infringement of that monopoly state occurs.”<sup>77</sup> He indicated that the “entrance fee” for patent infringement prosecution is somewhere between \$2 and \$5 million. For SMEs, the mere possibility of incurring this kind of cost discourages applying for patent protection in the first place. Plus, patent maintenance fees have to be added to the mix:<sup>78</sup>

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77 Douglas Barber (Distinguished Professor-in-Residence, McMaster University), [Evidence](#), October 23, 2012, 1155.

78 Diane Lank (General Counsel, Desire2Learn Incorporated), [Evidence](#), October 18, 2012, 1105.

(...) Canadian patent fee maintenance may be prohibitive to new companies. The maintenance fee regime differs from the U.S, where maintenance fees do not begin until a patent is issued.

Interestingly, cost and delay factors are not just barriers limited to SMEs. According to Gordon Davies (Chief Legal Officer and Corporate Secretary, OpenText Corporation), the primary disadvantage of patents is that they are the most expensive and time-consuming form of IP protection. Patent costs include application fees, maintenance fees and legal costs. Legal costs will also be incurred in cases where court action becomes necessary. For a company like OpenText Corporation, protecting intellectual property through trade secrets or by way of copyright is more attractive for two main reasons:<sup>79</sup>

(...) one, the registration of copyright is optional and copyright can be enforced without registration, which is, in any event, relatively inexpensive; and, two, trade secrets, by definition, cannot be registered and there are no registration costs.

Similarly, Douglas Barber suggested that businesses should carefully assess whether it is wise to file for patent protection at all; “black boxing” a technology via a trade secret is also an option. He also noted that the beauty of trade secrets is that they do not have to be disclosed and their use, as opposed to the secret itself, can still be licensed.

Sylvain Laporte acknowledged that Canada is not performing as well as some of its trading partners in terms of the time taken between the submission of a request for examination and the granting of a patent (the so-called “turn-around time”). Mr. Laporte stated that CIPO is working towards being on par with (or better than) Canada’s trading partners in this respect by:

- Proposing regulatory changes;
- Investing in new IT platforms; and
- Using industry best practices from a lean process management perspective to reduce “red tape” and eliminate waste.

Furthermore, Mr. Laporte stated that legislative changes that would reduce prescribed time limits for applicants to respond to CIPO’s questions would help reduce the turn-around time.<sup>80</sup>

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79 Gordon Davies (Chief Legal Officer and Corporate Secretary, Open Text Corporation), [Evidence](#), November 1, 2012, 1110.

80 Sylvain Laporte also noted that removing prescribed delays from legislation (and letting the Commissioner determine what delay is reasonable depending on circumstances) is an option worth contemplating.

## **ii. Possible Solutions to the Cost and Time Factors**

### **a) The Canadian Patent Prosecution Highway and other Considerations**

In terms of solutions, firms surveyed by Sustainable Development Technology Canada (hereafter “SDTC”) indicated that they are taking advantage of the Canadian Patent Prosecution Highway (hereafter “CPPH”).<sup>81</sup> Gordon Davies also expressed high praise for the CPPH initiative.<sup>82</sup>

In terms of reform, OpenText recognizes and appreciates the recent initiatives that have streamlined and increased the competitiveness of Canada’s intellectual property regime. These developments include the Patent Prosecution Highway, which is an initiative that accelerates and reduces the costs of examination for patent applications under certain conditions, through bilateral agreements with foreign patent offices.

While also praising the patent prosecution highway initiative, Gail Garland suggested that Canadian applicants should be allowed to file a “terminal disclaimer” as is the case in the United States. Terminal disclaimers allow the inventor to continue working on a patent and add embodiments while the application is in progress, “whereas in Canada you have to have all of those embodiments thought through and completely documented as part of your application.”<sup>83</sup> Ms. Garland also noted that some members of her organization file patent applications in the United States so that they can take advantage of the terminal disclaimer provision. (It should be noted that a terminal disclaimer does not extend the term of a patent.)

Karna Gupta (President and Chief Executive Officer, Information Technology Association of Canada) noted that the examination of a patent application can be deferred up to five years after filing in Canada; the examination can then take another two years. Mr. Gupta indicated that this deferral period makes it difficult for Canadian businesses to assess the risks for potential IP rights infringement during the application process and that Canada needs to move to a shorter deferral period in line with the model of the United States.

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81 The Patent Prosecution Highway is defined on the CIPO web site as “an initiative that provides a means of prioritizing examination of patent applications, under certain conditions, where an indication of patentable subject matter, or an indication of novelty, inventive step and industrial applicability (in the international phase) has been made. Where these and all other requirements are met, the applicant can make a request to CIPO, or to one of CIPO’s PPH partner offices, for accelerated examination of a corresponding application. Canadian patent applications will be examined in accordance with the Canadian *Patent Act* and *Patent Rules* and the Canadian Intellectual Property Office’s (CIPO) Patent Office Practice,” [http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h\\_wr02160.html](http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr02160.html).

82 Gordon Davies (Chief Legal Officer and Corporate Secretary, Open Text Corporation), [Evidence](#), November 1, 2012, 1115.

83 Gail Garland (President and Chief Executive Officer, Ontario Bioscience Innovation Organization), [Evidence](#), October 4, 2012, 1230.

## **b) A Canadian Version of the U.S. Provisional Patent Application Process**

To mitigate the cost and time factors previously discussed, some witnesses suggested adopting a Canadian version of the U.S. provisional patent application process. The provisional patent application, which can be seen as an informal process, allows a given application to not be reviewed for 12 months; thus, the potential patentee has 12 months to file a regular application:<sup>84</sup>

The U.S. offers a very informal patent filing process. It's called a U.S. provisional patent. It's very cheap. You don't need to spend a lot of dollars with patent agents to formally structure the patent in the claims that might typically be associated with a patent. You can literally take a manuscript, send in a fee of \$150, and get a stamp. You get a date on which you claim your invention. After that date, you have one year to formalize your patent through any international patent jurisdiction.

The reasons for using a provisional patent application are various. Gay Yuyitung noted that it is a highly cost-effective option and that her organization uses for its expediency; sometimes an application has to be filed quickly for a reason as simple as a professor presenting patentable material the next day at a conference.<sup>85</sup>

Several witnesses noted that the principal reason for filling a patent application first in the United States is that it is a much larger market than Canada. However, Erica Fraser noted that if Canada had a provisional system or another competitive system in place, it may make Canada more attractive as a place of first filling. Tony Stajcer noted, however, that provisional patents are not a "magic bullet" as they do have some drawbacks, such as the impossibility of introducing new IP within the application, given that everything has to be described within the first filing.

Sylvain Laporte (Commissioner of Patents, Registrar of Trade-marks, and Chief Executive Officer, CIPO) stated that although Canada has in place a process very similar to the provisional application option in the United States, it appears to be not very well known. Consequently, Mr. Laporte has committed to raising awareness about this process with Canadian post-secondary technology transfer offices.

## **c) Specialized Courts or Non-Judicial Administrative Procedures**

Specialized courts or non-judicial administrative procedures are other options that were mentioned by witnesses to reduce the cost and time associated with defending and enforcing IP rights. Jeremy de Beer noted that courts "are the avenue of redress for people

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84 Scott Inwood (Director, Commercialization, University of Waterloo), [Evidence](#), May 17, 2012, 0915.

85 Gay Yuyitung (Business Development Manager, McMaster Industry Liaison Office), [Evidence](#), May 17, 2012, 0915. Erica Fraser of Dalhousie University also made a similar point.

who feel their IP rights have been infringed.”<sup>86</sup> He expressed support for the creation of a specific division of the Federal Court to deal with IP issues at lower cost and on an expedited basis. On this issue, Richard Gold offered a differing view noting that there is no need for a speciality court. Denis Martel (Director, Patent Policy Directorate, Marketplace Framework Policy Branch, Industry Canada) submitted that the federal court de facto allocates IP cases to a subgroup of judges that are specialized in this area.

David Harris Kolada reported that one of the recommendations that came from the SDTC in-house survey was that it should be easier and cheaper for SMEs to enforce their patents, and to efficiently deal with infringement issues. Results from the survey suggested that a mechanism that could be helpful would be non-judicial administrative procedures, rather than litigation.

Karen Mazurkewich also advocated for the creation of specialised courts noting that they already exist in other countries, and stated that such specialised courts would be better able to support Canadian companies through the legal system, given that patents are increasingly used as “weapons of mass litigation.”<sup>87</sup> Ms. Mazurkewich also noted that many entrepreneurs support the idea of letting parties contest an application before a patent is granted, because “it’s a great way to weed out some of the bad apples.”<sup>88</sup> Robert Guay (Director, Intellectual Property Operations, Research in Motion) argued in favour of providing the opportunity for companies to question the validity of patents after they are issued.

#### **d) The Canadian Intellectual Property Office: Searchable Database, Online Accessibility, and Expertise**

Mr. Guay suggested that CIPO’s database infrastructure should be upgraded so that it is of the same quality as that found in other jurisdictions. Karen Mazurkewich referred to CIPO’s IP database as “antiquated” and urged it to be upgraded so that it can be searched more easily online.<sup>89</sup>

Mr. Guay also observed that patent expertise makes a big difference and commended CIPO’s efforts in this area while also noting that there is still room for improvement. In particular, the “searching ability” of CIPO’s database is something that is important to companies like Research In Motion as it leads to a higher quality patent examination process.

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86 Jeremy de Beer (Associate Professor, Faculty of Law, University of Ottawa, As an individual), [Evidence](#), May 15, 2012, 0915.

87 Karen Mazurkewich (Director, Intellectual Property, Canadian International Council), [Evidence](#), October 2, 2012, 1100.

88 Ibid., 1245.

89 Ibid.

Both Gail Garland and Mark Eisen indicated that the Canadian IP application process is unforgiving and that rights could be lost for reasons that are beyond the control of applicants (e.g., missed deadlines, mistakes in fee payments, etc.). Ms. Garland noted that if patent information and file histories were accessible online, as they are in the United States and the European Union, it would help reduce the probability of inadvertent patent loss by inventors.

## B. Business Method Patents, Software Patents, and Patent Trolls

### i. Business Method Patents

Whether patents should be granted to business methods (a.k.a., business practices) was the subject of considerable debate.<sup>90</sup>

Business method patents have been controversial since the 1998 U.S. decision opened the door, or floodgates as some would call it, to patent a new business method. Many academics have argued that such patents are bad for innovation in business, and for that reason the courts should hold that business methods are not patentable.

Witnesses speaking on this issue did not take a strong stance as to whether business methods should be patentable. Interestingly, however, academics offered opposing views as to who should decide whether business methods should be patentable in the first place. Richard Gold mentioned that having Parliament or the federal government act through legislation or regulation often adds more confusion to a given policy issue. Mr. Gold suggested that CIPO is better equipped, given its knowledge of the systems in place in the United States, to make this kind of fundamental policy decision, and recommended that this agency should therefore be granted more authority in this regard. In contrast, Norman Siebrasse (Professor, Faculty of Law, University of New Brunswick) stated that “this is a matter for the legislature and not the courts, and certainly not the patent office, to decide whether business methods should be patentable.”<sup>91</sup> He further suggested that, currently, the law is not clear and that the issue of patentable subject matter needs clarification by governments in order to make sure that innovation is encouraged in certain areas, such as personalized medicine. According to Mr. Siebrasse’s assessment, courts are not equipped to examine complex questions such as whether business method patents are good for innovation.

### ii. Software Patents

Similar to the issue of business method patents, much debate exists on the question of whether software should be patentable. Although software is patentable in the United States, there was no clear consensus as to whether this should be permitted in

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90        Norman Siebrasse (Professor, Faculty of Law, University of New Brunswick, As an Individual), [Evidence](#), October 4, 2012, 1120.

91        Ibid.

Canada. Witnesses noted that software patents are not necessarily used to drive innovation, but are rather used in cases of litigation. For example, if company A intends to sue company B for patent violation, and company B owns a significant number of software patents, company B could threaten to counter sue company A for software patent violation in order to discourage company A from proceeding with the initial court challenge. This strategy could be used either in a defensive or an offensive context; as such, its role in driving innovation may be questionable:<sup>92</sup>

When one talks about patents, one talks about offensive use and defensive use. It gets back to this issue of mutual destruction. If we have a patent, we can say to a competitor that if he continues doing something, we're going to sue him or make him pay us licence fees. That's an offensive use. If, however, they come after us and say that they're going to sue us, we can say that if they sue us, we're going to sue them back, because they're infringing. Had we had Canadian patents, it would not have been helpful because we were sued in the U.S.

(...) The company's position is that software business method patents don't help innovation. They are used more in business wars than to truly protect something that is unique and novel.

Although in favour of software patenting, Gordon Davies conceded that patent protection is not necessarily crucial for a company like OpenText, which views patent protection primarily as a defensive tool rather than as a means to spur innovation. Given the high frequency of civil litigation cases in the United States, this defensive strategy is employed by companies and individuals operating in the American market. Chris Tortorice (Corporate Counsel, Microsoft Canada Inc.) also expressed support for software patenting saying that there are many examples of this type of patent working well, such as in the case of different companies using both proprietary patented software items and open-source items in their R&D efforts. Robert Guay indicated that patenting of software and patenting of business methods is context specific, and that generalizations as to whether they are good or bad should be avoided.

### iii. Patent Trolls

Patent trolls could be seen as an extreme case of an offensive IP strategy. Patent trolls are defined as non-practising entities that own patents but that do not commercialize them. The *modus operandi* of patent trolls is to let other companies use the patented good or process, and then sue them for patent infringement. This approach ultimately allows patent trolls to charge excessive licensing fees to the other company, once that company has become dependent upon the patented technology, good, or process. Norman Siebrasse provided the following analogy to illustrate the functioning of patent trolls.<sup>93</sup>

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92 Diane Lank (General Counsel, Desire2Learn Incorporated), [Evidence](#), October 18, 2012, 1125.

93 Norman Siebrasse (Professor, Faculty of Law, University of New Brunswick, as an individual), [Evidence](#), October 4, 2012, 1230.

Let's say you're going to retire and you are going to sell your tiny condo in Vancouver and take the \$3 million you get for it and buy a beautiful dream property in a remote area. You find a property that looks great, but you need to access it across somebody else's property. You would negotiate the access right then to go through the back entrance of their lot with a \$10,000 licence. Now instead of negotiating the licence, let's say you build your million-dollar dream home and then you go to the neighbour and say that you need access across his property. Well, you are not going to get it for \$10,000. It may be \$100,000. What are you going to pay? Your house is there.

That's what trolls do. They don't license at the outset. They license once the business is set up and then they pop out of the woodwork. The patentee has a hard time finding them, because they're not out there practising.

Mr. Siebrasse further noted that patent trolls have not been particularly active in Canada and, as a result, it may not represent a topic that needs to be urgently addressed by the federal government at this particular time. Nevertheless, he suggested that it may be worthwhile for Canada to adopt provisions, as a principle, that patent trolls cannot get a court injunction, and therefore, they cannot bring the commercial activity of another business to a halt.

### C. International Co-operation

A very strong consensus existed among witnesses that there is a need for better collaboration and improved harmonization internationally with respect to IP protection. The issue of harmonization begs the question whether or not Canada's IP regime should converge towards another international model (for example, that of the United States) or whether other models should converge towards the Canadian approach. On this aspect, CIPPO had the following to say about the American patent regime:<sup>94</sup>

I would maybe offer an opinion that Canada has actually something that they [the U.S.] are aspiring to. So they're going to take the next four to five years to implement this new America Invents Act to actually align themselves with a legal framework that is closer to the Canadian framework. But Canada is also closer to the rest of the world, so the United States is actually coming to the rest of the international community. I'm not saying that there aren't areas in their legal framework that would be beneficial to us, but principally, from a big-picture perspective, they're in a bit of a catch-up mode.

Notwithstanding the above, Gordon Davies urged for greater global harmonization of patent law and prosecution regimes, which would eventually allow for a Canadian patent protection regime that is streamlined and more efficient. Mr. Davies cited the harmonization of patent applications together with the harmonization of the laws surrounding what constitutes a patentable invention as examples of measures that would reduce uncertainty and compliance costs, and thus, could reduce the cost of filing for patent protection in multiple countries.

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94 Sylvain Laporte (Commissioner of Patents, Registrar of Trade-marks and Chief Executive Officer, Canadian Intellectual Property Office), [Evidence](#), May 10, 2012, 1030.

Diane Lank (General Counsel, Desire2Learn Incorporated) remarked that in a perfect world, there would be a completely harmonized system internationally, but since this is not possible, communications and better collaboration between Canada and all its trading partners are key (notably with the two IP powerhouses in terms of market size, the United States and the European Union). Diane Lank gave a specific example in this regard:<sup>95</sup>

We'd also like the U.S. system to be more cognizant of damages that should be actually awarded in patent cases. Although the patent over which we were sued had very little relation to our overall product, the initial request by Blackboard was for a licensing fee of 45% of all of our revenue. There must be some relationship between the value of the patented technology and the product as a whole.

Richard Gold stated that, in general, Canada meets all international obligations. He expressed that Canada falls somewhat in the middle of the pack in terms of the level of protection granted by its IP regime, relative to other countries. He further argued that in the case of patents, the level of protection granted by the Canadian regime to IP owners is, in most cases, higher than in other jurisdictions, notably the United States.

It should be noted that there is a debate as to whether Canada meets all its international obligations in terms of IP protection. The exchange between Richard Gold and Chris Tortorice exemplifies this debate:<sup>96</sup>

**Mr. Richard Gold (Professor, Faculty of Law, McGill University):** Technically, and I think Mr. Tortorice would agree, we do meet all international agreements that we have ratified. I think he was suggesting that Canada has signed but not ratified certain treaties from the World Intellectual Property Organization, which would include TPMs, etc., and he would like us to comply with those even though we have not yet ratified them.

So we meet the current state of intellectual property law, internationally. If we were to ratify those without changes, our laws would not be in compliance. However, there are a lot of different ways one could implement those.

**Mr. Chris Tortorice (Corporate Counsel, Microsoft Canada Inc.):** There is perhaps a nuance in there that I don't fully appreciate. I would hope that if Canada were going to sign those treaties, it would be prepared to live up to them. I think our trading partners, once we've signed those agreements, look to us to live up to them.

Whether it's implementation or formal ratification or whatever word you want to say, copyright is a perfect example. We're not finished yet. We're close. Everyone is pleased that it has gone as far as it has. We need to get the job done to make sure that Canada's keeping up with those obligations. Once it signs those treaties, I think it's time for Canada to measure up to the international standards that other countries that have signed them are living up to.

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95 Diane Lank (General Counsel, Desire2Learn Incorporated), [Evidence](#), October 18, 2012, 1105.

96 Richard Gold (Professor, Faculty of Law, McGill University, As an individual) and Chris Tortorice (Corporate Counsel, Microsoft Canada Inc.), [Evidence](#), June 7, 2012, 1000.

## D. Super Trade-marks

Robert Currie (Associate Professor, Schulich School of Law and Director, Law & Technology Institute, Dalhousie University) spoke about official trade-marks (sometimes called “super trade-marks”), which is a type of trade-mark that allows public authorities “to reach into the market and exert nearly impenetrable control over words and phrases and things.”<sup>97</sup> Mr. Currie expressed that there is good public policy rationale behind official trade-marks, the goal being to protect important national government symbols from being misused by commercial entities to promote their products. However, Mr. Currie also stated that the use of official trade-mark provisions have been at times abused by governments in ways that stifle innovation and distort markets:<sup>98</sup>

Public authorities have sometimes used these marks not for public purposes exclusively, but to generate commercial revenue at the unnecessary expense of taxpayers and at the unnecessary expense of small business people.

Mr. Currie recommended that the parts of the *Trade-marks Act* dealing with official marks be either abrogated or significantly amended to restrict their scope. On this issue, Sylvain Laporte also noted that official marks have been used at times by governments (or government-owned entities) more as a commercial tool than as a means of protecting important government symbols.

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97 Robert Currie (Associate Professor, Schulich School of Law; and Director, Law & Technology Institute, Dalhousie University, As an Individual), [Evidence](#), November 6, 2012, 1210.

98 Ibid.

## CHAPTER V — FIGHTING COUNTERFEITING AND PIRACY

### 1. Background

Intellectual Property crime — copyright piracy and trademark counterfeiting — is a growing international phenomenon.<sup>99</sup> “Counterfeiting” refers to the act of forging, copying, or imitating something without the express right to do so and with the purpose of deceiving or defrauding consumers or businesses.<sup>100</sup> Counterfeiting usually involves placing a widely recognized trade-mark on an imitation of a product in order to deceive consumers or businesses. “Piracy” refers to the copying and selling of an authentic product without the authority of the owner; typically, this practice involves producing an unauthorised reproduction of, for example, a movie, music recording or computer software.<sup>101</sup>

Clothing, footwear, handbags and watches may be the most well-known consumer goods targeted by counterfeiters, but according to the Royal Canadian Mounted Police (hereafter “RCMP”), counterfeit automotive parts, along with electrical, pharmaceutical and food products, have entered the Canadian market. Moreover, unlike in the past, Canadian consumers now frequently fail to realize that they are purchasing counterfeit goods, as some counterfeit products are difficult to distinguish from the genuine items they imitate. Since counterfeiters spend no money on R&D, marketing, taxes, or quality control, they operate with huge profit margins and can therefore offer their counterfeit goods at what appear to be bargain prices.<sup>102</sup>

Witnesses indicated that the Internet has made it much easier to source and import counterfeit products for individuals. Counterfeit products used to be mostly imported in mass quantities and then distributed domestically through illicit channels. However, the advent of e-commerce now allows an individual to buy and import counterfeit products and have the items delivered directly to them. Consequently, individual imports of counterfeit products are much more difficult to stop.

The damages caused by counterfeit goods are numerous:<sup>103</sup>

- health and safety hazards;
- product liability claims;

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99 RCMP, Intellectual Property Rights Crime, <http://www.rcmp-grc.gc.ca/fep-pelf/ipr-dpi/index-eng.htm>.

100 Baker & McKenzie, *Canadian Anti-Counterfeiting Laws & Practice: A Case for Change*, pp. 1–2, [www.cacn.ca/publications/Canadian%20Anti-Counterfeiting%20Laws%20&%20Practice\\_WP85744v2.pdf](http://www.cacn.ca/publications/Canadian%20Anti-Counterfeiting%20Laws%20&%20Practice_WP85744v2.pdf).

101 Ibid.

102 RCMP, Intellectual Property Rights Crime, <http://www.rcmp-grc.gc.ca/fep-pelf/ipr-dpi/index-eng.htm>.

103 Baker & McKenzie, *Canadian Anti-Counterfeiting Laws & Practice: A case for change*, p. 5, [www.cacn.ca/publications/Canadian%20Anti-Counterfeiting%20Laws%20&%20Practice\\_WP85744v2.pdf](http://www.cacn.ca/publications/Canadian%20Anti-Counterfeiting%20Laws%20&%20Practice_WP85744v2.pdf).

- lost sales by legitimate brand owners;
- loss of goodwill associated with genuine products;
- job losses;
- lost profits for a firm associated with the overhead cost of fighting counterfeit goods;
- loss of tax revenue for governments; and
- increased levels of organised crime.

It is difficult to obtain a precise estimate of the market for counterfeit or pirated products in Canada. Compounding this problem is the fact that companies are often reluctant to report that their products have been counterfeited as this could have adverse consequences on their brand image and, consequently, their sales.<sup>104</sup>

INTERPOL notes that pirated and counterfeit goods have confirmed links to organized crime and terrorism.<sup>105</sup> In Canada, the RCMP, the Canada Border Services Agency (hereafter “CBSA”), and other Canadian law enforcement agencies are responsible for addressing IP crime. Under the *Copyright Act*, unauthorized manufacturing, importation or distribution of copyrighted products is subject “to a fine not exceeding one million dollars or to imprisonment for a term not exceeding five years or to both.”<sup>106</sup>

A number of witnesses stressed the importance of copyright and trade-mark protection to encourage innovation and attract investments:<sup>107</sup>

By providing rights holders with the tools they need to protect their rights and pursue those who facilitate piracy, a robust IP regime enables creators and companies to choose for themselves the best way to make their products available to the marketplace. This encourages investment in the development of new products, services, and

<sup>104</sup> The Chair of the Canadian Anti-Counterfeiting Network made this point: “... what happens here is that companies don’t want their name associated with counterfeit products because it has a negative effect on their market. So they’re very, very shy about opening up to the press or putting that in writing so that people can actually say, Company XYZ has a fake product, because nobody else will buy that product again. They’re very careful with that, so it’s hard to get that kind of information.” Wayne Edwards (Chair, Canadian Anti-Counterfeiting Network; and Vice President, Electro-Federation Canada), [Evidence](#), October 30, 2012, 1145.

<sup>105</sup> Officially known as “ICPO-INTERPOL” (International Criminal Police Organization — International Police), INTERPOL “is the world’s largest international police organization, with 190 member countries.” Please see the INTERPOL web site: <http://www.interpol.int/About-INTERPOL/Overview>.

<sup>106</sup> *Copyright Act*, Section 42(1)(g) <http://laws-lois.justice.gc.ca/eng/acts/C-42/page-33.html#h-43>.

<sup>107</sup> Jason Kee (Director, Policy and Legal Affairs, Entertainment Software Association of Canada), [Evidence](#), October 18, 2012, 1115.

distribution methods, and supports a diverse range of new and innovative business models, which in turn fosters legitimate competition, more consumer choice, and ultimately, lower prices for consumers.

In general, witnesses noted that the *Copyright Modernization Act* is a clear step in the right direction, but also pointed out that trade-mark legislation needs to be amended to address counterfeiting issues. Witnesses addressed what they felt were flaws in Canada's enforcement mechanisms and suggested Canada's border and custom officers should have more power to seize goods that they suspect are counterfeit; they also stated that these deficiencies have existed for some time and have been identified in past reports and studies.<sup>108</sup>

## **2. Ex-Officio Powers for Customs Officials**

Many witnesses testified that CBSA should be provided with *ex-officio* powers to seize counterfeit products when they are discovered at Canadian points of entry. *Ex-officio* powers for customs officials would mean that they could seize suspected counterfeit products on their own initiative when these goods enter Canada. Both Wayne Edwards (Chair, Canadian Anti-Counterfeiting Network, and Vice-President, Electro-Federation Canada) and Terry Hunter (Manager, Anti-Counterfeiting and Intellectual Property Enforcement, Canadian Standards Association) recommended that CBSA officials should be provided with the express authority to "target, detain, seize, and destroy counterfeit goods."<sup>109</sup> Currently, a court order has to be issued to seize counterfeit products; witnesses indicated that this process is cumbersome and ineffective:<sup>110</sup>

Right now customs officials do not have the power to seize on their own power things they identify or suspect to be counterfeit or pirated. They can do so only if they have a court order in hand, which a rights holder like me has been able to get — which would mean that I magically understood that the goods were being smuggled across the border and knew when it was going to happen — or if they've received a request from the RCMP to detain.

It was further noted that *ex-officio* powers for customs and border officials to seize merchandise is standard in other jurisdictions. A representative from Canada Goose (a manufacturer of outerwear clothing) contrasted how the company works with an

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108 For example: "[Counterfeiting and Piracy are Theft](#)" (Report of the Standing Committee on Industry, Science and Technology, June 2007) and "[Counterfeiting in the Canadian Market: How do we Stop it?](#)" (Canadian Intellectual Property Council, June 2012).

109 Wayne Edwards (Chair, Canadian Anti-Counterfeiting Network; and Vice President, Electro-Federation Canada), [Evidence](#), October 30, 2012, 1110, and Terry Hunter (Manager, Anti-Counterfeiting and Intellectual Property Enforcement, Canadian Standards Association), [Evidence](#), October 30, 2012, 1115.

110 Jason Kee (Director, Policy and Legal Affairs, Entertainment Software Association of Canada), [Evidence](#), October 18, 2012, 1220.

IP crime unit in the United Kingdom relative to how they work with Canadian law enforcement officials:<sup>111</sup>

First of all, we work with the IP crime unit out of the U.K., who helps us educate border patrol throughout Europe. Working with us, they seize and destroy counterfeit product, almost at a cost-neutral position. They send us notices when they find product and we pay for the destruction of it. We can't do that here in Canada because border patrol has no ex officio rights to seize counterfeit product, and we need that support.

Chris Tortorice quoted the World Trade Organization in noting that customs officials are often the only individuals who know when counterfeit goods are being transported, and further noted that a necessary condition for effective border control is to have customs officials act on their own initiative to stop shipments suspected of being counterfeit. He therefore urged legislative changes to provide customs officials with *ex-officio* powers to detain or seize counterfeit goods. Furthermore, Mr. Tortorice suggested that these legislative changes should allow for disclosure of information and provision of samples of suspect goods to rights holders, as well as explicitly prohibiting the importation of counterfeit goods. Similarly, Dale Ptycia (Senior Manager, Licensing, Hockey Canada) also supported legislative changes to empower CBSA's front-line officials.

Providing customs officials *ex-officio* powers raises the issue of what happens when legitimate products are seized and held. On this point, Jason Kee (Entertainment Software Association of Canada) offered that cooperation between law enforcement agencies and rights holders is key, as the former will have to rely on the latter to determine whether infringement occurs. As with other issues dealing with IP, Mark Eisen stressed the importance of a balanced approach; seizure of legitimate imports at the border should lead to a form of compensation:<sup>112</sup>

Implementing recommendations creates a push on one side — say on the brand-name side — that has to be somehow countered with the ability not to push too hard. An example is cost awards in the case of a wrongful seizure of goods. Without those types of things in play, you can create a very unbalanced situation. So I think the recommendations are valid, but they have to be looked at as a balancing act and not just as straight help, one side of the story.

### **3. Counterfeiting: Civil and Criminal Remedies**

Several witnesses mentioned that criminal provisions as well as civil provisions in the form of statutory damages should be included in the *Trade-marks Act*. According to Daniel Drapeau (Litigator, Advisor and Trade-Mark Agent), the RCMP and crown prosecutors act only pursuant to the *Copyright Act* as this legislation includes criminal provisions. He also noted that criminal provisions dealing with trade-mark violations are in

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111 Kevin Spreekmeester (Vice-President, Global Marketing, Canada Goose Inc.), [Evidence](#), October 25, 2012, 1150.

112 Mark Eisen (President, Intellectual Property Institute of Canada), [Evidence](#), May 15, 2012, 1020.

the *Criminal Code*, which creates a jurisdictional problem. According to Chris Tortorice, “there are gaps between offences in the *Criminal Code* and what the *Copyright Act* and *Trade-marks Act* state. We need to bring those closer together to make sure those systems work.”<sup>113</sup>

Similarly, there are no statutory damages provided for in the *Trade-marks Act*, but such damages are part of the *Copyright Act*.<sup>114</sup> Daniel Drapeau explained that statutory damages are “damages for which you don’t need to prove an actual loss. It’s a nominal amount fixed in the act that you get as a plaintiff when the defendant is found guilty of infringing your copyright.”<sup>115</sup> Chris Tortorice suggested that statutory damages provided for in the *Trade-marks Act* should be at least equivalent to damages currently awarded by Canadian courts in trademark infringement cases.

Martin Lavoie (Director of Policy, Manufacturing Competitiveness and Innovation, Canadian Manufacturers and Exporters) pointed out that, with respect to counterfeiting, both the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights as well as the North American Free Trade Agreement (hereafter “NAFTA”) require criminal enforcement measures, and also quoted from a U.S. government report that encourages Canada to provide stronger sentences for cases of IP rights violation.

#### **4. Education, Coordination, Verification and Enforcement**

Aside from legislative changes, witnesses noted that there are other means to render the fight against counterfeiting and piracy more effective in Canada. These means can be described under the banners of “Education, Coordination, Verification and Enforcement.” The sections below provide a description of each of these concepts.

##### **A. Education**

As mentioned in the first section of this chapter, there are numerous damages caused by counterfeit goods. Kevin Spreekmeester of Canada Goose provided a description of counterfeit versions of their products:<sup>116</sup>

We had three jackets tested at the labs at Feather Industries Canada. Two of them had absolutely no traces of down insulation in them at all. They were filled with bird parts — anything off the factory floor. They were covered in mildew, bacteria, feces, whatever they could get their hands on, and that’s what’s coming into Canada.

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113 Chris Tortorice (Corporate Counsel, Microsoft Canada Inc.), [Evidence](#), June 7, 2012, 0945.

114 Daniel Drapeau (Litigator, Advisor and Trade-Mark Agent, DrapeauLex Inc., As an Individual), [Evidence](#), October 25, 2012, 1210.

115 Ibid.

116 Kevin Spreekmeester (Vice-President, Global Marketing, Canada Goose Inc.), [Evidence](#), October 25, 2012, 1150.

Several witnesses mentioned that better education of the public with respect to the damage caused by counterfeit and pirated products is needed. Dale Patycia underscored the need for an industry-government partnership to better educate the public on counterfeiting. Jason Kee noted that CIPO has a mandate to educate the Canadian population on IP, but questioned whether CIPO's programs are adequate. Wayne Edwards mentioned that buying counterfeit goods is often viewed as unethical by the population at large, but it is also considered a victimless crime, and that this view has to change through education, and in particular, stressed the importance of educating youth so that they change their behaviour and attitudes about illicit downloads and pirated goods. Mr. Edwards also pointed out that a strong emphasis must be placed on the health and safety risks linked to using uncertified counterfeit goods, particularly with regard to electrical/electronic products.

Chris Tortorice mentioned that consumers used to follow the old adage that if something is too good to be true, it probably is not. However, Mr. Tortorice pointed out that the price of counterfeit goods can often be comparable to the price of authentic goods, so it is more difficult for consumers to distinguish between the two, and stated that "we need government to clearly and frequently convey the importance intellectual property plays in developing knowledge-based economies and ensuring our country's ability to compete globally."<sup>117</sup>

## B. Coordination

Witnesses stressed the importance of industry-government coordination to identify and stop the flow and spread of counterfeit products. In particular, there is little on-going contact between industry and CBSA.<sup>118</sup>

I'll give you an example of how many contacts I have had with CBSA in the three years I've been working for CSA. On a daily basis from U.S. Customs I get two to eight contacts a day verifying certification marks. I've been contacted by CBSA one time in three years.

Further to Terry Hunter's point above, Jason Kee cited the example of the United States where there is in place an "IP enforcement coordinator":<sup>119</sup>

(...) the IP Enforcement Coordinator, which is a new office under the White House. It reaches out to the disparate departments that each have their piece of the IP puzzle to make sure they are all communicating with each other and looking at ways to do better enforcement using the resources that are available.

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<sup>117</sup> Chris Tortorice (Corporate Counsel, Microsoft Canada Inc.), [Evidence](#), June 7, 2012, 0905.

<sup>118</sup> Terry Hunter (Manager, Anti-Counterfeiting and Intellectual Property Enforcement, Canadian Standards Association), [Evidence](#), October 30, 2012, 1115.

<sup>119</sup> Jason Kee (Director, Policy and Legal Affairs, Entertainment Software Association of Canada), [Evidence](#), October 18, 2012, 1150.

Mr. Kee also noted that there is currently in Canada an informal working group comprised of representatives from the RCMP, CBSA, and rights holders groups; he suggested that formalizing this arrangement through an “IP Crime Task Force” would be helpful. Mr. Tortorice made a similar point saying that the current informal arrangement often means that the communication channels between the various parties (industry, CBSA, and RCMP) varies greatly depending on where you are located in the country. He also urged for the implementation of a centralized IP crime task force unit.

Finally, Daniel Drapeau stressed that the lack of communication between government authorities and IP rights owners often means that the latter are unable to get the necessary information to undertake their own civil suits to seek remedies.

### C. Verification

Some witnesses proposed the implementation of a registration system that would allow for a more formal approach in verifying the authenticity of products coming across the border. Mr. Drapeau indicated that such a system would replace the current ad-hoc approach and provide an additional tool to customs officials:<sup>120</sup>

A registration system at the border is very simple. You have a trademark registry in Canada. You have a copyright registry in Canada. You just create a registry system at the border. That way at least you give customs officials one tool to identify people who have rights.

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120 Daniel Drapeau (Litigator, Advisor and Trade-Mark Agent, DrapeauLex Inc., As an Individual), [Evidence](#), October 25, 2012, 1205.

**Box 1 — The U.S. Trade-mark Recordation System** ([extract from the United States Patent and Trademark Office](#))

Record Trademarks with Customs and Border Protection (hereafter “CBP”)

Please note that U.S. CBP, a bureau of the Department of Homeland Security, maintains a trademark recordation system for marks registered at the United States Patent and Trademark Office. Parties who register their marks on the Principal Register may record these marks with CBP, to assist CBP in its efforts to prevent the importation of goods that infringe registered marks. The recordation database includes information regarding all recorded marks, including images of these marks. CBP officers monitor imports to prevent the importation of goods bearing infringing marks, and can access the recordation database at each of the 317 ports of entry.

In October 2005, CBP released the Intellectual Property Rights e-Recordation (hereafter “IPRR”) system. This new system allows rights holders to electronically file IPRR recordation applications, thus significantly reducing the amount of time normally required to process paper applications. Some additional benefits of the new system include:

- Elimination of paper applications and supporting documents.
- Copies of the certificate issued by the registering agency (U.S. Patent and Trademark Office or the Copyright Office) are retained by the right holder, not submitted to CBP.
- Payment by credit card (preferred), check or money order.
- Ability to upload images of the protected work or trademark, thus obviating the need to send samples to CBP.
- Reduced time from filing of the application to enforcement by field personnel.

Both Mr. Drapeau and Terry Hunter (Manager, Anti-Counterfeiting and Intellectual Property Enforcement, Canadian Standards Association) noted that the United States has a trade-mark recordation system (see Box 1 for an overview of the U.S. recordation system). Mr. Hunter noted that IP rights holders are required to pay a small registration fee to participate in the U.S. system.

#### **D. Enforcement**

At times, the problem with counterfeiting and piracy does not rest with the lack of authority invested in CBSA officials or with a lack of civil or criminal remedies, but rather with the fact that current legislated IP protection provisions are not enforced. Jason Kee noted a marked improvement by the RCMP in putting a higher priority on IP crime, but expressed that much work remains to be done at the Crown prosecutors' level:<sup>121</sup>

Even when you have someone who is clearly a bad actor, is clearly a criminal actor, who has fallen within those provisions, sometimes law enforcement doesn't necessarily pursue those cases, or if they do pursue those cases, and they've actually become much better in recent years at taking IP crime seriously, the prosecutors don't take it forward.

To remedy this enforcement problem, Mr. Kee proposed allocating more resources to fighting IP crimes, notably through internal education programs for law enforcement officials as well as Crown prosecutors.

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121 Jason Kee (Director, Policy and Legal Affairs, Entertainment Software Association of Canada), [Evidence](#), October 18, 2012, 1150.

## **CHAPTER VI — THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA) AND INTELLECTUAL PROPERTY PROTECTION IN THE CANADIAN PHARMACEUTICAL INDUSTRY**

Canada's pharmaceutical industry is one in which producers face very high fixed costs (notably in the form of major capital R&D expenditures) along with long drug development times before commercialization. Given these characteristics, the pharmaceutical industry often exemplifies why IP rights are crucial to foster research and innovation:<sup>122</sup>

It [the pharmaceutical industry] engages in research-based innovation that's narrowly focused since the invention may be only a single drug molecule. In this case, the length of the term of IP protection is crucial because the commercialization of a new drug is very costly, and it's a long regulated process whose timeline is only very partly under the company's control. So the firm needs market exclusivity long enough to enable it to recover the costs of commercialization and make a profit to keep new products coming....

Amongst the study's witnesses, there was a consensus on the strategic role of patents in the innovation process in the pharmaceutical industry. However, much debate exists as to the duration of patents and the type of protection patents should provide to pharmaceutical companies.

### **1. The Comprehensive Economic and Trade Agreement (CETA) and the Position of “Brand-name” Pharmaceutical Companies**

This issue of IP protection in the pharmaceutical industry was brought to the forefront during the current negotiations for the Comprehensive Economic and Trade Agreement (hereafter “CETA”) with the European Union. In fact, the European Union is urging Canada to strengthen its IP framework in three areas for pharmaceutical products. Brand-name pharmaceutical companies are, in turn, wholeheartedly supporting these demands as they have long contended that IP protection in Canada is inadequate for the needs of their industry:<sup>123</sup>

Right now, Canada has a unique opportunity to conclude the Canada-EU comprehensive economic and trade agreement, CETA, and make necessary improvements to harmonize our life sciences IP regime with European levels.

Specifically, we believe the federal government should do the following: one, create an effective right of appeal for innovators in patent invalidity proceedings — it's a simple matter of fairness; two, improve our data protection regulations from eight to 10 years, an incremental but important change; and three, implement patent term restoration, which already exists in every other OECD nation except New Zealand, Mexico, and Canada.

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122 Tom Brzustowski (Retired Professor, Telfer School of Management, University of Ottawa, as an individual), [Evidence](#), November 6, 2012, 1205.

123 Brigitte Nolet (Director, Government Relations and Health Policy, Specialty Division, Hoffmann-La Roche Limited, Canada's Research-Based Pharmaceutical Companies), [Evidence](#), October 23, 2012, 1100.

These improvements would make Canada's IP regime more stable and predictable.

Declan Hamill (Chief of Staff and Vice-President, Legal Affairs, Canada's Research-Based Pharmaceutical Companies) provided more information about the concept of patent term restoration:<sup>124</sup>

It allows innovators to claim some element — not all elements — of the time that is expired in the context of regulatory approval times, which can be quite long in Canada and other countries. It allows them to make an application to have some of that time restored at the end of the patent term.

Gail Garland also expressed support for the adoption of CETA noting that this agreement "is a unique opportunity for Canada to become the only country in the world with favoured trade status with both the United States and the European Union."<sup>125</sup> Ms. Garland also pointed out that the lack of patent term extension negatively impacts Canadian SMEs looking to bring innovations to market given that for any product, fewer years of market exclusivity results in reduced overall product life-cycle revenue. Ms. Garland also noted that, in both the United States and the European Union, patent terms can be extended for up to five years to compensate for time lost due to regulatory delays.

Addressing the concern that stronger IP protection could lead to increased drug prices and impact the budgets of Canada's provincial drug plans, Brigitte Nolet (Canada's Research-Based Pharmaceutical Companies) indicated that provincial governments have many tools at their disposal to control these costs. Furthermore, Ms. Nolet also contended that it is rather unusual to change IP protection in order to reduce health care costs as these two policy discussions are typically conducted independently of one another.

## **2. Position of the Generic Pharmaceutical Companies**

While strongly supporting a Canada-EU trade agreement, Canada's generic drug manufacturers have expressed strong opposition to the European Union's demands with respect to IP protection noting that Canada's patent system is already more stringent in many respects than those systems found in the European Union and the United States. The testimony of Jim Keon (President, Canadian Generic Pharmaceutical Association) illustrates this opposition:<sup>126</sup>

In its totality, pharmaceutical intellectual property in Canada is stronger than that in any other industrial sector in Canada. In many ways it is stronger than pharmaceutical intellectual property in the United States and Europe. For example, in Canada brand-

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<sup>124</sup> Declan Hamill (Chief of Staff and Vice-President, Legal Affairs, Canada's Research-Based Pharmaceutical Companies), [Evidence](#), October 23, 2012, 1150.

<sup>125</sup> Gail Garland (President and Chief Executive Officer, Ontario Bioscience Innovation Organization), [Evidence](#), October 4, 2012, 1115.

<sup>126</sup> Jim Keon (President, Canadian Generic Pharmaceutical Association), [Evidence](#), October 4, 2012, 1105.

name pharmaceutical companies benefit from a unique automatic injunction against generic entry up to 24 months long. (...)

In Canada, unlike in the U.S., we have no statutory incentive for generic pharmaceuticals to challenge patents. Our regulatory data protection lasts several years longer than the international average. In Canada, pharmaceutical patentees have the ability to obtain patents on multiple aspects of a drug, without any mechanism for generic companies to oppose such patents, except through litigation.

In particular, generic manufacturers have expressed strong concern about the patent linkage system in Canada. According to the Canadian Generic Pharmaceutical Association, such a system constitutes an enforcement mechanism for a patentee because the health and safety approval of a new generic medicine could be blocked by way of an automatic injunction "without any upfront burden of proof."<sup>127</sup> Mr. Keon noted that a patent linkage system is actually illegal in the European Union under their competition laws, and referred to the generic drug industry as a "disciplining agent," arguing that the Canadian system relies on such companies to challenge weak patents through the courts.<sup>128</sup> C. Benjamin Gray (Vice-President, Legal and General Counsel, Mylan Pharmaceuticals ULC, Canadian Generic Pharmaceutical Association), pointed out that accepting patent term extensions would do significant damage to the generic pharmaceutical industry.

### **3. The Academic Perspective**

Academics provided their opinions on the issue of IP protection in the pharmaceutical industry in the context of the CETA negotiations. Richard Gold was sceptical about whether accepting European Union demands would encourage innovation in Canada.<sup>129</sup>

Certainly, we're under pressure from both the United States and Europe to increase patent rights, especially in the pharmaceutical sector. There's no evidence that this will benefit Canadian innovation. It will likely cost us.

(...) in terms of intellectual property itself, are you asking me whether there is a Canadian justification? The answer is no.

Norman Siebrasse supported the idea of patent term extension, stating that the basic argument in favour of such extensions is to compensate producers for the industry-specific regulatory delays they face so that the pharmaceutical industry has effectively the

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127 Ibid.

128 Ibid.

129 Richard Gold (Professor, Faculty of Law, McGill University, As an individual), [Evidence](#), June 7, 2012, 0930.

same patent life as other industries. He classified objections to patent term extension as either “principled” or “pragmatic.”<sup>130</sup>

The basic argument against it, what I call the principled argument against it, is how much time is really needed. (...) We don't know that 17 years is optimal. Maybe five years is optimal. I don't think one year is optimal. Maybe 30 years is optimal, for all we know. It's a very difficult empirical question. (...) That's the principled objection.

The pragmatic objection to patent term extension is to say that we're going to get the benefits anyway.

Mr. Siebrasse also indicated that the patent linkage system (i.e., the notice of compliance system) is due for review, and urged lawmakers to look at the pharmaceutical patent system as a whole, and not only at specific details of this system as requested by Canada's trading partners.

Marc-André Gagnon (Assistant Professor, School of Public Policy and Administration, Carleton University) supported the idea of patent term restoration with one caveat:<sup>131</sup>

Finally, if we want to go for a patent term restoration — for example, the delay for approval — to get it back in terms of extended patent protection, it's not a problem. It's just a patent. It's not a right. It's a privilege granted by the state, and the state can require specific conditions to grant this privilege. The idea would be to impose the condition that a significant portion of these additional revenues because of patent term restoration be reinvested in Canada. I think you would really create a knowledge-based economy.

With respect to data protection term extension, Mr. Gagnon noted that the purpose of extending data protection is to encourage pharmaceutical companies to do research and clinical trials on already existing drugs to determine whether they could have other therapeutic uses. Additionally, Mr. Gagnon expressed that it could make sense to extend data protection but warned not to confuse “data protection” with “data secrecy;” protecting data makes sense in the context of intellectual property rights, but “data secrecy” (as often required by Health Canada) is unacceptable as it impedes other researchers from having access to clinical data. Finally, Mr. Gagnon also called patent linkage regulations “costly” and “ineffective,” and recommended their elimination, and also criticised patent issuance in Canada as being too lax and operating on the “premise that generic manufacturers will challenge patents before the courts.”<sup>132</sup>

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130 Norman Siebrasse (Professor, Faculty of Law, University of New Brunswick, As an individual), [Evidence](#), October 4, 2012, 1210.

131 Marc-André Gagnon (Assistant Professor, School of Public Policy and Administration, Carleton University, As an individual), [Evidence](#), June 12, 2012, 0940.

132 Ibid., 0950.

## **CHAPTER VII — CONCLUSION AND RECOMMENDATIONS**

Upon consideration of the testimony provided, the Committee makes the following recommendations to the Government of Canada, grouped by major themes examined during the course of the study.

### **WITH REGARD TO THE CANADIAN INTELLECTUAL PROPERTY OFFICE AND GOVERNMENT OF CANADA POLICY AND PROGRAMS:**

- 1. The Committee recommends that the Government of Canada review international best practices on developing an evidence base to support IP policy decision-making and to determine how IP contributes to the performance of the Canadian economy.**
- 2. The Committee recommends that the Government of Canada (and, specifically, the Canadian Intellectual Property Office) actively engage with Canadian businesses to raise awareness of IP rights and provide greater support to business seeking to protect their IP.**
- 3. The Committee recommends that the Government of Canada (in order to support Canadian businesses on the global stage and ensure the administration of Canada's IP regime is internationally compatible and streamlined) ratify the following key international agreements: the Patent Law Treaty, the Madrid Protocol and Singapore Treaty for trademarks, and the Hague Agreement for Industrial Designs.**
- 4. The Committee recommends that the Government of Canada further study means to grow innovative Canadian companies to keep valuable intellectual property in Canada and close the productivity gap with our competitors.**
- 5. The Committee recommends that the Government of Canada take steps to increase the awareness of the importance of IP among researchers and SMEs and develop training programs that help enhance the strategic management of IP assets.**
- 6. The Committee recommends that the Government of Canada develop consistent IP policies for the Canadian aerospace industry across all government departments and streamline the restrictions on how IP can be used; make policies in programs such as SADI more flexible with respect to foreign collaboration; and, strengthen aircraft procurement policies by negotiating IP rights when purchasing foreign aircraft.**

## **WITH REGARD TO STREAMLINING THE INTELLECTUAL PROPERTY PROCESS**

1. The Committee recommends that the Government of Canada study the barriers, in terms of cost and time, for SME's to register, affirm or defend their IP.
2. The Committee recommends that the Government of Canada examine domestic and international patent Frameworks to determine whether the proper balance is reached in Canada between incentivizing innovation and fostering competition in the marketplace. In so doing, the Government should identify ways to:
  - Strengthen patent quality;
  - Enhance patent disclosure; and
  - Improve the efficiency of the system for enforcing patent rights.
3. The Committee recommends that the Government of Canada should only consider expanding patentability to new subject matter when there is clear and demonstrable evidence of benefit to Canadians and competition.
4. The Committee recommends that the Government of Canada explore options to simplify and strengthen support including education for the filing of patents for small businesses.
5. The Committee recommends that the Government of Canada work with the Canadian Intellectual Property Office to introduce regulations and legislation that will reduce the time it takes to grant IP rights and bring Canada in line with other countries.
6. The Committee recommends that the Government of Canada review the geographical distribution of registered patent agents across Canada.

## **WITH REGARD TO INDUSTRY/ACADEMY/GOVERNMENT COLLABORATION**

1. The Committee recommends that the Government of Canada encourage universities to work together to develop template agreements by sector that could provide greater certainty for businesses entering into partnerships with university researchers. Government laboratories should work to develop similar template agreements.

## **WITH REGARD TO PIRACY/COUNTERFEIT/ TRADE-MARKS/COPYRIGHTS**

1. The Committee recommends that the Government of Canada strengthen IP rights protection by introducing legislative measures to better combat counterfeiting and piracy at the border, including:
  - Providing appropriate *ex-officio* powers to customs officials;
  - Introducing civil and criminal remedies for trademark counterfeiting;
  - Allowing customs officials to share information with rights holders regarding suspected goods.
2. The Committee recommends that the Government of Canada review international best practices in the area of prohibited marks to determine whether modifications to the *Trade-marks Act* are necessary.
3. The Committee recommends that the Government of Canada include consumer groups in addition to industry groups in education and coordination efforts to combat piracy and counterfeit.
4. The Committee recommends that the Government of Canada ensure that appropriate authority be vested in the RCMP and border officials to do their work, while ensuring respect for civil liberties and due process. This may need to include compensation in cases where seizure of goods was not warranted.
5. The Committee recommends that the Government of Canada ensure that criminal remedies be available where trade-mark counterfeiting or copyright piracy are both willful and on a commercial scale. However, consumers themselves are often unable to distinguish between legitimate and counterfeit products, and as a result excessive fines for individual consumers acting non-wilfully are inappropriate.
6. The Committee recommends that the Government of Canada introduce legislation which amends parts of the *Trade-marks Act* dealing with official marks to restrict the scope of official marks to important national government symbols and to narrow the definition of public authorities to avoid stifling innovation and distorting markets.

**WITH REGARD TO SPECIFIC CHALLENGES FACING THE CANADIAN PHARMACEUTICAL INDUSTRY**

1. The Committee recommends that the Government of Canada ensure the pharmaceutical IP regime strikes a balance between encouraging investment in the development of new innovative drugs while ensuring Canadians have access to affordable pharmaceuticals.
2. The Committee recommends that the Government of Canada undertake an independent, evidence-based review of challenges facing the brand-named pharmaceutical sector in Canada to determine the most appropriate solutions and steps to be taken.



# APPENDIX A

## LIST OF WITNESSES

<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<b>Department of Industry</b>	2012/05/10	30
Konstantinos Georgaras, Director, Policy, International and Research Office, Canadian Intellectual Property Office		
Agnès Lajoie, Assistant Commissioner of Patents, Canadian Intellectual Property Office		
Sylvain Laporte, Commissioner of Patents, Registrar of Trade- marks and Chief Executive Officer, Canadian Intellectual Property Office		
Denis Martel, Director, Patent Policy Directorate, Strategic Policy Sector		
Gerard Peets, Acting Director General, Strategy and Planning Directorate, Strategic Policy Sector		
<b>As individuals</b>	2012/05/15	31
Ruth M. Corbin, Managing Partner and Chief Executive Officer, CorbinPartners Inc.		
Jeremy de Beer, Associate Professor, Faculty of Law, University of Ottawa		
<b>Canadian Intellectual Property Council</b>		
Graham Henderson, Co-chair		
<b>Intellectual Property Institute of Canada</b>		
Mark Eisen, President		
Michel Gérin, Executive Director		
<b>As an individual</b>	2012/05/17	32
Catherine Beaudry, Associate Professor, Department of Mathematical and Industrial Engineering, École Polytechnique de Montréal		
<b>McMaster University</b>		
Gay Yuyitung, Business Development Manager, McMaster Industry Liaison Office		
<b>University of Manitoba</b>		
David T. Barnard, President and Vice-Chancellor		
Digvir S. Jayas, Vice-President, Research and International		
<b>University of Waterloo</b>		
Scott Inwood, Director, Commercialization		
<b>As an individual</b>	2012/06/07	35
Richard Gold, Professor, Faculty of Law, McGill University		

<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<b>Hockey Canada</b> Dale M. Ptycia, Senior Manager, Licensing		
<b>Microsoft Canada Inc.</b> Chris Tortorice, Corporate Counsel		
<b>UBM Techinsights</b> Harry Page, Chief Executive Officer		
<b>As individuals</b>	2012/06/12	36
Marc-André Gagnon, Assistant Professor, School of Public Policy and Administration, Carleton University		
Ian Hargreaves, Professor, Digital Economy, Cardiff University		
<b>Bubble Technology Industries Inc.</b> Lianne Ing, Vice-President		
<b>Dalhousie University</b> Erica Fraser, Manager, Technology Commercialization, Engineering/Sciences, Industry Liaison and Innovation		
<b>Communitech</b>	2012/06/19	37
Avvey Peters, Vice-President, External Relations		
<b>Consortium for Research and Innovation in Aerospace in Québec</b> Clément Fortin, President and Chief Executive Officer		
<b>MITACS</b> Rob Annan, Director, Policy, Research and Evaluation		
<b>Sustainable Development Technology Canada</b> David Harris Kolada, Vice-President, Corporate and Market Development		
<b>Aerospace Industries Association of Canada</b>	2012/10/02	39
Lucie Boily, Vice-President, Policy and Competitiveness		
Maryse Harvey, Vice-President, Public Affairs		
<b>Canadian International Council</b> Karen Mazurkewich, Director, Intellectual Property		
<b>COM DEV International Ltd.</b> Tony Stajcer, Vice-President, Corporate Research and Development		
<b>As individuals</b>	2012/10/04	40
George Dixon, Vice-President, Research, University of Waterloo		
Norman Siebrasse, Professor, Faculty of Law, University of New Brunswick		

<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<b>Canadian Generic Pharmaceutical Association</b> C. Benjamin Gray, Vice-President, Legal and General Counsel, Mylan Pharmaceuticals ULC Jim Keon, President		
<b>Ontario Bioscience Innovation Organization</b> Gail Garland, President and Chief Executive Officer		
<b>Desire2Learn Incorporated</b>	2012/10/18	42
Diane Lank, General Counsel		
<b>Entertainment Software Association of Canada</b> Jason Kee, Director, Policy and Legal Affairs		
<b>Canada's Research-Based Pharmaceutical Companies (Rx &amp; D)</b> Declan Hamill, Chief of Staff and Vice-President, Legal Affairs Brigitte Nolet, Director, Government Relations and Health Policy, Specialty Division, Hoffmann-La Roche Limited	2012/10/23	43
<b>Genome Canada</b> Pierre Meulien, President and Chief Executive Officer		
<b>Research In Motion</b> Morgan Elliott, Director, Government Relations Robert Guay, Director, Intellectual Property Operations		
<b>TEC Edmonton</b> Chris Lumb, Chief Executive Officer		
<b>As individuals</b>	2012/10/25	44
Douglas Barber, Distinguished Professor-in-Residence, McMaster University Daniel S. Drapeau, Litigator, Advisor and Trade-Mark Agent, DrapeauLex Inc.		
<b>Canada Goose Inc.</b> Kevin Spreekmeester, Vice-President, Global Marketing		
<b>Startup Canada</b> Victoria Lennox, Chief Executive Officer Dave Waters, Advisor, Government, Industry and Academic Advisory Council		
<b>Canadian Anti-Counterfeiting Network</b>	2012/10/30	45
Wayne J. Edwards, Chair and Vice-President, Electro-Federation Canada		
<b>Canadian Standards Association</b> Terry Hunter, Manager, Anti-Counterfeiting and Intellectual Property Enforcement		

<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<b>Eaton Yale Company</b> Vladimir Gagachev, Manager, Regulatory Affairs, Electrical Sector		
<b>National Research Council Canada</b> John McDougall, President		
<b>Canadian Manufacturers and Exporters</b>	2012/11/01	46
Martin Lavoie, Director of Policy, Manufacturing Competitiveness and Innovation		
<b>Information Technology Association of Canada</b> Karna Gupta, President and Chief Executive Officer		
<b>Larus Technologies Corporation</b> Rami Abielmona, Vice-President, Research and Engineering		
<b>Open Text Corporation</b> Gordon A. Davies, Chief Legal Officer and Corporate Secretary		
<b>As individuals</b>	2012/11/06	47
Tom Brzustowski, Retired Professor, Telfer School of Management, University of Ottawa		
Robert J. Currie, Associate Professor, Schulich School of Law and Director, Law & Technology Institute, Dalhousie University		
<b>Polytechnics Canada</b> Ken Doyle, Director, Policy Nobina Robinson, Chief Executive Officer		
<b>Xerox Canada</b> Patricia Hawkins, Business Manager, Research Agreements and Innovation Services, Xerox Research Centre of Canada Emechete Onuoha, Vice-President, Citizenship and Government Affairs		
<b>Department of Industry</b>	2013/02/05	55
Konstantinos Georgaras, Director, Policy, International Affairs and Research Office, Canadian Intellectual Property Office Agnès Lajoie, Assistant Commissioner of Patents, Canadian Intellectual Property Office Sylvain Laporte, Commissioner of Patents, Registrar of Trademarks and Chief Executive Officer, Canadian Intellectual Property Office Denis Martel, Director, Patent Policy Directorate, Marketplace Framework Policy Branch Gerard Peets, Senior Director, Strategy and Planning Directorate, Marketplace Framework Policy Branch		

## **APPENDIX B**

## **LIST OF BRIEFS**

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### **Organizations and Individuals**

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**Aerospace Industries Association of Canada**

**Beaudry, Catherine**

**Canada Goose Inc.**

**Canadian Anti-Counterfeiting Network**

**Canadian Association of Learned Journals**

**Canadian Association of the International Federation of Intellectual Property Attorneys**

**Canadian International Council**

**Canadian Standards Association**

**Consortium for Research and Innovation in Aerospace in Québec**

**Corbin, Ruth, M.**

**Currie, Robert, J.**

**Department of Industry**

**Drapeau, Daniel, S.**

**Gagnon, Marc-André**

**Gold, Richard**

**Information Technology Association of Canada**

**Intellectual Property Institute of Canada**

**Larus Technologies Corporation**

**McOrmond, Russell**

**National Research Council Canada**

**Sustainable Development Technology Canada**

**TEC Edmonton**

**University of Waterloo**



# **REQUEST FOR GOVERNMENT RESPONSE**

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* ([Meetings Nos. 30, 31, 32, 35, 36, 37, 39, 40, 42, 43, 44, 45, 46, 47, 51, 52, 53, 55, 57, 58 and 59](#)) is tabled.

Respectfully submitted,

David Sweet, M.P.  
Chair



# **DISSENTING OPINION OF THE NEW DEMOCRATIC PARTY**

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## **Productivity gap:**

The productivity gap between Canada and its main competitors threatens our economy and our ability to maintain our quality of life into the 21<sup>st</sup> century. This *is* now a widely accepted fact, supported by numerous studies by the Canadian Council of Academies (2009), the Science and Technology and Innovation Council (2010) and, more recently, the Jenkins Report (2011).

*“The challenge, of course, and the reason there’s so much discussion around this area, is that Canada suffers from a lack of productivity related to poor innovation. We have below average BERD spending, we’re in the bottom third of PhD graduates per capita.”* (Rob Annan, Director of Policy, MITACS, June 19, 2012, 09h10)

The NDP believes the productivity gap must be at the core of any discussion on innovation and intellectual property. As a consequence, the NDP members of the Industry Committee present a dissident opinion to highlight significant elements of testimony of independent experts or industry sectors whose views are not adequately represented in the main report.

## **Innovation, intellectual property and good-jobs for Canadians:**

*“Innovation has market value and intellectual property may or may not. It’s just an output.*

*We have to be careful not to focus our policies on getting more intellectual property rights. We should focus on better IP, not more IP rights. Better IP will drive innovation, which has market value. That is what drives jobs and economic growth in all sectors—the knowledge economy, manufacturing, everything.”* (Professor Jeremy de Beer, University of Ottawa, May, 15, 2012, 10h15, emphasis added).

The NDP is concerned that early on the Committee was guided by a “more is better” bias in approaching intellectual property. Expert witnesses are clear that high-quality intellectual property and patents will foster innovation, but that intellectual property rights are only one element in a larger toolbox to stimulate business R&D and innovation.

## **Plugging the leaks of Intellectual property**

Canada needs smarter policies to support the right kind of intellectual property, and we need the right tools to maintain our most innovative companies and intellectual property in Canada. Canada’s intellectual property deficit has been valued at a whopping \$4.5 billion. That is bad for Canadian jobs and bad for the economy.

*"We did some research looking at how many small and medium-sized companies were involved in mergers and acquisition deals in Canada over a period of five years. What we discovered was that about 58% of the companies that were sold went to overseas buyers, and 66% of the IP went abroad, which means that overseas buyers heavily covet our companies that are rich in intellectual property ...we need to recognize that something is missing in this country. Something is not anchoring.... We're not keeping enough of our IP in this country. I think, and maybe Tony would agree, that anchoring IP in this country would also help to create jobs.." (Karen Mazurkewich, Director, Intellectual Property, Canadian International Council (CIC), October 2, 2012, 11h45).*

It is thus critical to consider the issue of intellectual property in the wider context of the challenges facing small start-ups, the manufacturing, aerospace and pharmaceutical sectors, and other government programs in support of research and development.

#### **Cuts to SR&ED – a bad recipe for innovation and productivity:**

If the ultimate aim of the study is to direct the government to improve Canadian innovation and productivity, then it is critical that government also review other major changes in support to programs. For example, numerous witnesses have suggested that cuts to the Scientific Research and Experimental Development Program would have disastrous effects on business investments in research and development and innovation...

*"What we have done effectively, by reducing the SR and ED credit, is penalized our current investments, which as I mentioned, are throwing off a great deal of productivity, not just for our company, but also for the country." (Mr. Emechete Onuoha, Vice-President, Citizenship and Government Affairs, Xerox Canada, November 06, 2012).*

*"In total, you are talking about \$750 million in reduced incentives for companies. How that will impact companies' actual investments in R and D...based on the surveys we have done, the reduction of business R and D expenditure will be between 25% and 30% as a result of these measures. You're talking somewhere between \$1 billion and \$1.5 billion, according to the survey we conducted this year. (Martin Lavoie, Director of policy, Canadian Manufacturers and Exporters Nov. 1, 2012, 12h45)*

#### **Recommendation:**

**That the Government delay the planned \$500 million cut to the SR&ED program and instead consult with industry on improvements to support for business R&D that do not result in a net loss of funding and potential loss of IP.**

**Recommendation:**

**That the government further study means to grow innovative Canadian companies to keep valuable intellectual property in Canada and close the productivity gap with our competitors.**

**Recommendation:**

**That the government of Canada explore options to simplify and provide better support including education for the filing of patents for small businesses.**

**Intellectual property for our aerospace industry:**

Canada's aerospace industry leaders were clear. The government of Canada was not doing enough to support our world-class aerospace sector, and this timidity is harming our companies. The government needs to negotiate with a stronger hand in purchasing aircraft from foreign companies to obtain the intellectual property necessary to perform high-value maintenance and repair.

*"The last, but also extremely important, issue is in terms of government procurements or federal acquisitions of foreign aircraft. ... Our SMEs particularly are at a great disadvantage, because they don't have access to this IP because government does not negotiate it at the front end ... "We have to reinforce our procurement policies by negotiating upfront access to IP, which is so necessary to create more of these high-value jobs that the industry already provides." (Lucy Boily, Vice-President, Policy and Competitiveness, Aerospace Industries Association of Canada) October 2, 2012, 11:10*

**Recommendation:**

**That the government better leverage procurement and Industrial Regional Benefit agreements to secure intellectual property from original equipment manufacturers to help integrate Canadian companies into global value chains.**

**Getting it right: pharmaceutical innovation and health care costs**

As free-trade negotiations between Canada and the European Union draw to a close, the decline of Canada's research-based pharmaceutical companies was of particular concern to NDP members of the Industry Committee. While the extension of brand-named pharmaceutical patent rights was touted as solution to fix Canada's declining investments in pharmaceutical R&D, a recent study shows this would increase health care costs by \$2.8 billion annually. The NDP is eager to create high-value added research jobs and protect health care costs, especially for seniors.

Independent witnesses were clear that the pharmaceutical industry was undergoing important restructuring and that granting additional patent rights was unlikely to bring additional R&D investments to Canada and increase therapeutic innovation.

*"If you look at the accord that was done in around 1989 with the pharmaceutical industry, they promised to move us up to 10% of the revenues we invested in R and D, which would still be about half of the OECD average. They hit it for a few years ...and now were back to the old levels ... So giving the [pharmaceutical companies] more [IP] is not going to bring them back ... We can triple our patent rights and it's not going to have a marked increase, at least on an economic basis." (Professor Richard Gold, McGill University, 1030)*

Increasingly, successful businesses in the 21<sup>st</sup> century economy, including pharmaceutical companies, are embracing early stage collaborative strategies to develop common intellectual property and accelerate the pace of innovation for all partners. This model was hailed as a success to be explored by more sectors.

*"It's not anti-IP, right? It's a precompetitive stage before the competition really starts, and it just speeds up the process. We know that pharmaceutical companies are struggling to get new products out the door, and sharing of data upstream will speed up that discovery process and allow them to compete down the value chain." (Pierre Meulien, CEO, Genome Canada, October 23, 2012, 12h20)*

This raises the question of whether more intellectual property rights or simply more innovative business strategies and targeted incentives are the real solution for this industry. Furthermore, as CETA negotiations have been held behind closed doors, NDP members feel more transparency is needed to assess options the government may be pursuing for pharmaceutical related reforms to our intellectual property regime, and the implications for provinces, consumers, federal budgets and industry.

As the Committee heard no testimony on the Patent Law Treaty, the Madrid Protocol and Singapore Treaty for trade-marks, and Hague Agreement for Industrial Designs, New Democrat committee members are surprised by the inclusion of a recommendation regarding these treaties in the majority report. The Committee should seek more information before pronouncing on such treaties.

**Recommendation:**

**That the government of Canada undertake an independent, evidence-based review of challenges facing the brand-named pharmaceutical sector in Canada to determine the most appropriate solutions and steps to be taken.**

**Recommendation:**

**That the government of Canada provide greater transparency with regards to its position and the state of CETA negotiations concerning pharmaceutical patents.**

**Recommendation:**

**That the government arrive at a trade agreement with Europe that will not increase the cost of prescription drugs for seniors.**

**Supporting the innovation pipeline:**

Innovation is a process, and it is critical that it is being harnessed at all stages including the earliest. While Canada must do more to bring new inventions and ideas to market, it is critical that we not abandon the necessary investments to spur the next generation of innovations.

*"It is important to maintain funding for what is called "blue sky research", meaning research that can go anywhere and find anything.*

*I have seen you all with your BlackBerrys this morning. Maxwell's equations form the basis for the transmission of electronic signals. Fifty years passed before Hertz and Marconi put them to work. I feel sure that, these days, Mr. Maxwell would not have received any funding, so no one would have a cell phone. We have to keep funding discovery research.*

*Of course, we have to maintain an overall balance between basic research, applied research and subsequently the commercialization of research. Otherwise, discovery research will no longer exist. We may well have brought a lot of things to market, but there will be nothing coming down the pipeline ... So granting agencies play a very important role, that of funding basic research. (Professor Catherine Beaudry, École Polytechnique de Montréal, May 12, 2012, 9h40)."*

**National Research Council:**

**Recommendation:**

**Recognizing the substantive role the National Research Council plays in supporting research, including through patents and peer-reviewed papers, and generating knowledge, that the government immediately disclose details to Parliament on its plans to support a refocus on business-led, industry-relevant research.**

**Recommendation:**

**That the NRC maintain ownership of IP generated through its personnel, and that it maintain its support to non-oriented research and development through long-term, stable and consistent funding mechanisms for undertakings in fundamental research.**

### **Counterfeiting:**

In light of the ongoing proliferation of counterfeit consumer products entering the Canadian market, New Democrat committee members note that dealing with counterfeiting and copyright infringement is important for both Canadian businesses and consumers. This is especially important where counterfeit goods may put the health or safety of Canadians at risk.

In spite of these challenges, the Conservatives have not taken timely and balanced action to deal with counterfeit goods. Furthermore, Budget 2012 announced cuts of \$143 million to the Canada Border Services Agency, which will reduce frontline officers and further reduce our ability to monitor our borders.

A balanced approach to tackling counterfeiting or infringements must address both the public interest and the interests of trade-mark or copyright holders. This will require consultation to ensure the rights and interests of individuals are respected while addressing the growing costs of counterfeiting to Canada's economy.

### **Recommendation:**

**That the government include consumer groups in addition to industry groups in education and coordination efforts to combat piracy and counterfeit.**

### **Recommendation:**

**That appropriate authority be vested in RCMP and border officials to do their work, while ensuring respect for civil liberties and due process. This may need to include compensation in cases where seizure of goods was not warranted.**

### **Recommendation:**

**That criminal remedies be available where trademark counterfeiting or copyright piracy are both willful and on a commercial scale. However, Consumers themselves are often unable to distinguish between legitimate and counterfeit products, and as a result excessive fines for individual consumers acting non-wilfully are inappropriate.**

### **Recommendation:**

**That the government stop cutting the budget of CBSA and instead ensure the agency has adequate resources to properly combat counterfeiting without compromising its other important responsibilities in protecting Canadians and defending our border.**