

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

Submission to the
Standing Committee on Finance

August 2nd, 2019

Recommendation 1

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

Recommendation 2

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

Recommendation 3

That the federal government adopt a “Simplified Procedure” of the existing RFA process on counterfeit goods.

Recommendation 4

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

Recommendation 5

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

IMPLEMENT A FIRST PATENT PROGRAM

CIPO has already made a commitment to environmental protection. Since 2011 CIPO has protected 390 'green' technologies through a fast-tracked patent application.¹ CIPO has also conducted research in respect of patented inventions related to climate change mitigation technologies. CIPO examined the level of patenting of high-value climate change mitigation technologies (CCMT) by Canadian businesses between 2008 and 2012 and concluded that high value innovation (HVI) businesses experienced 44% growth over the 2008-2012 period, increasing on average 13% annually.²

The University of Cambridge conducted a study that researched hundreds of new green technology companies in the US. The study confirmed the patenting activity of a start-up increases over 73% on average when it collaborates with a government agency. Laura Diaz Anadon, Professor of Climate Change Policy at the University of Cambridge stated: "Our findings suggest that some of the signs commonly used to track innovation and business success, such as patents and financing, increase when new cleantech companies' partner with US government departments or labs."³

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

The Quebec government launched a new Innovation Program (Programme Innovation) similar to the proposed First Patent Program that provides Quebec-based companies with up to \$500 000 of financial assistance for the innovation of new products.⁴ These funds are applied towards investments in obtaining patents and developing IP strategies. The financial assistance provided by the Program can cover up to 50% of incurred expenses.⁵

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

² Intellectual Property Office. "Patented Inventions in Climate Change Mitigation Technologies." Canadian Intellectual Property Office. October 09, 2018. Accessed July 04, 2019. https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr04289.html#wb-tphp.

³ University of Cambridge. "Green tech startups see boost in patents and investment when partnering with government." ScienceDaily. www.sciencedaily.com/releases/2019/03/190318102407.htm (accessed July 4, 2019).

⁴ Paquette, Jean-Christophe. "New Program for Québec Companies Rewards Innovation with Financial Assistance: Smart & Biggar/Fetherstonhaugh." New Program for Québec Companies Rewards Innovation with Financial Assistance | Smart & Biggar/Fetherstonhaugh. January 24, 2019. Accessed July 04, 2019. http://www.smart-biggarc.ca/en/articles_detail.cfm?news_id=1515.

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

IPIC recommends that the Government of Canada create a similar program in the 2020 Budget. The program would provide assistance to small and medium size businesses and start-ups that have developed an innovative idea and are in a position to seek patent protection but may not have the financial resources to do so. IP agents often find after early stage consultations with Canadian businesses that they have patentable ideas and inventions without realizing it. When these inventions are with clean tech companies they can have significant impacts nationally and on the environment.

Estimated Costs of the Program

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

CREATE AN INTELLECTUAL PROPERTY BOX (“IP BOX”)

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

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

Quebec announced, in its 2016 budget, a similar patent box initiative that would lower corporate income tax from 11.8 to 4 percent, as of January 2017, on income that meets several criteria. Saskatchewan introduced an IP Box tax incentive reducing the corporate tax rate to 6% for a period of 10 years on income derived from commercializing their IP.

Cost Indicators

- In its 2016 Budget, the Quebec government estimated a cost of \$135 million over five years for its fiscal incentive.

- Statistics released in September 2017 by the UK Revenue and Customs department indicate that in 2014-15, the second year of the UK Patent Box, 1135 companies claimed the tax relief, for a total value of £651.9 million.

ADOPT A SIMPLIFIED PROCEDURE FOR COUNTERFEIT GOODS SEIZED AT CANADIAN BORDERS

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

The requirement to prosecute a civil action or conclude an agreement with the importer to destroy counterfeit goods, together with the high storage costs, are a real deterrent, discouraging trademark owners from filing Requests for Assistance in Canada. This compromises Canada's anti-counterfeiting efforts, in addition to damaging Canada's reputation around the world.

IPIC proposes a "simplified procedure" mechanism which would apply only to defined "counterfeit goods". This procedure resembles that set out in 2010 by the British Revenue and Customs Agency in the Goods Infringing Intellectual Property Rights Customs Regulations 2010. The procedure works as follows: suspended goods may be treated as abandoned for destruction where the rights holder has informed Customs in writing within the specified period that it believes that those goods infringe an IP right.⁶

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

Recommendation

That the federal government adopt a "Simplified Procedure" of the existing RFA process.

⁶ Wilson, David, and Rachel Montagnon. "HMRC Issues New "simplified Procedure" for the Seizure and Destruction of Goods Infringing IP Rights." Lexology. March 09, 2010. Accessed July 04, 2019. <https://www.lexology.com/library/detail.aspx?g=bfe5a124-f11e-47f3-90d2-4d27b6f97a1c>.

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

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

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

Recommendation:

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

FUNDING FOR CBSA WAREHOUSING AND DESTRUCTION OF COUNTERFEIT GOODS

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

Shipments would be more economically dealt with by a system like the US system that allows the border services agency, upon receipt of proof that the goods in question are infringing, to destroy the goods while storage costs are still at an insignificant level.

The US Customs and Border Protection Agency [reported having seized](#) over 33,000 shipments of counterfeit goods in 2018. By comparison, Canada's Border Services Agency have only detained less than 100 shipments over the last four years.

A significant increase in seizures or detentions utilizing a better funded model will provide Canada with a much more effective and internationally recognized program of border enforcement.

Cost Estimate:

- 1000 counterfeit shipment seizures per year*
- \$1000 on average for warehousing and destruction per shipment
- 2500 registrations under the RFA program
- \$200/RFA registration (\$500,000/2years)

*Assumption based on a mandate given to CBSA to increase seizures of shipments.

Recommendation

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

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

REQUEST TO APPEAR

IPIC would highly value an opportunity to appear before the committee and present testimony about these recommendations.

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