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The Interface Between Intellectual Property Law and Competition Law in Canada

by *Ivan R. Feltham, Q.C.**

INTRODUCTION

This presentation will be preceded in the conference by two papers which deal with Canadian and U.S. competition law and those will have provided a substantial introduction to the general principles of U.S. antitrust law and competition law in Canada. I will also assume that it follows Mr. Arnold's excellent paper which will have identified issues that are relevant under the laws of both Canada and the United States.

First, it will be useful to identify briefly the statutory or common law basis for intellectual property rights in Canada. With some qualification with regard to trade marks, intellectual property rights described as patents, registered industrial designs, copyrights and trade marks are created by federal law (Canada Act, Section 91).

Briefly stated, patents are provided for under the Patent Act (Revised Statutes of Canada 1970, Chapter P-4) which states in Section 46 that:

Every patent granted under this Act shall . . . grant to the patentee and his legal representatives for the term therein mentioned, from the granting of the patent, the exclusive right, privilege and liberty of making, constructing, using and vending to others to be used the said intervention, subject to adjudication in respect thereof before any court of competent jurisdiction.

Thus, the Patent Act confers upon the patent holder an exclusive property right in the claim or claims described in the patent. That others may be excluded by suitable proceedings, from exclusive right is, by the nature of the constitutional foundation for the grant, coextensive with the territory of the granting authority, namely, Canada.

Similarly, an industrial design (a shape, pattern or ornament as applied to an article of manufacture and discernible by mere viewing) is exclusively the property of the registrant under the Industrial Design Act (R.S.C. Chapter I-8 (1970)).

Under the Copyright Act (R.S.C. Chapter C-30 (1970)), original literary, dramatic, musical and artistic works are protected from unauthorized copying. The protection arises without registration, but registration does enhance the position of the copyright owner.

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Trade marks are somewhat different in that protection of a trade mark or trade name is embodied in the Common Law, but is enhanced by the process of registration under the Trade Marks Act (R.S.C. Chapter T-10 (1970)).

The foregoing will not be sufficient to satisfy anyone familiar with those arcane fields of law, but will suffice for the purposes of this paper. The essential point is that the owner of an intellectual property right may enjoy his bundle of rights which constitute the intellectual property, and this bundle of rights or property is similar in many respects to other commonly recognized forms of property whether real or personal. Although they may be embodied in tangible objects, intellectual property rights are essentially conceptual and this feature may make it more difficult to define the limits of appropriate exploitation of the property than is the case with tangible goods or realty.

It is important to note that I do not approach the subject of this discussion from the point of view that intellectual property rights are the grant of any kind of privilege by the state. I consider them rights or property with peculiar definitional characteristics just as any other property which may be inherited, transferred by assignment, expropriated, etc., depending on other relevant areas of law and the nature of the property itself.

Having said this, it follows that there is no problematical mystery in identifying the issue as to what limits, with regard to the exploitation of intellectual property, may be imposed by competition laws of general application. I do not think it is useful, indeed I think it is misleading and improper, to approach intellectual property laws as some kind of exemption or carve-out from competition laws. Although the question is straight forward, the answer is not readily found.

With regard to practical significance in the context of competition law considerations, the patent has been the subject of great concern and much debate. This is undoubtedly the result of the leverage afforded to the owner of a patent on a valuable invention. Industrial designs and trade marks do not lend themselves to the same exploitation through leverage. One might say that one can leverage off a patent a substantial number of benefits which others are willing to agree to and pay for while industrial designs and trade marks are exploitable in a much narrower sense. This has in historical perspective been largely the case also with copyrights, but the modern importance of computer software will prove to be equally important, if it has not already done so.

It is important to note the difference and make a distinction between the property right itself and contractual rights or obligations which may be built on and around the property.

There has been a lot of debate about the desirability of granting patent protection and more particularly about the details of such protection in specific fields, such as pharmaceuticals. Although it is widely recognized that innovation is desirable and some exclusive protection of the

results of innovation is necessary to encourage innovation, there is uneasiness about anyone holding exclusive, unqualified rights to a valuable invention when it is perceived that utilization by others (presumably upon payment of a reasonable fee) would contribute significantly to the public good. It is perhaps too simplistic to draw the analogy with the man who owns a hundred acres of park land and to whom it might be suggested he should open fifty or sixty acres for public enjoyment.

For the purposes of this paper, one is tempted to say that it is not necessary to get into the debate about the appropriateness of whether patents should be generously or restrictively granted with reference to the innovative features as displayed by the disclosure and the various other issues that were debated, for example, in the Working Paper on Patent Law Revision (Canada, Consumer and Corporate Affairs, 1976) and the Economic Council of Canada Report on Intellectual and Industrial Property (January 1971). These followed the extensive reports of the Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs (Report on Copyright 1957, and Report on Patents 1960). To ignore the process by which the property rights are determined and granted, and the extent of the property rights so granted, leaves one feeling uneasy that an essential part of the inquiry is being neglected. However, whatever the nature of the grant, there will always be a potential interface between the property rights so created and the competition law of general application. So let us pursue the conventional approach and examine the elements of competition law which may be relevant. I shall leave for later reference the provisions of the Canadian Patent Act which deal with, to use the marginal note, "abuse of rights under patents."

Related in practical terms to the intellectual property rights created or protected by statute, secret information (know-how; show-how) is often associated with patents. Indeed, trade secrets are an essential part of the intellectual property, broadly defined, which may be a valuable asset of any business. Licensing all or any part of a package of related patents, etc. and trade secrets may involve various restrictions and other conditions which raise antitrust issues. The differences among the various scenarios is that where, for example, a patent is involved, certain power to impose conditions may be said to be necessarily implied by the statutory patent grant, while in the case of secret information there is no such basis for using the license grant as a Christmas tree to hang on a variety of ornaments. Still, the basic concept is the same: I have property in the trade secrets in the sense that they are capable of being transferred to others, or alternatively kept to myself for my exclusive use. Not being obliged to disclose my trade secrets, I may argue persuasively that if I do choose to share them with another, I should be able to impose any condition I wish.

THE COMPETITION ACT

The Canadian Competition Law, which has appeared in various

forms in the Criminal Code and the Combines Investigation Act since 1889, presently appears in the statute called the Competition Act which came into effect June 19, 1986. At the same time, the Competition Tribunal Act created the special tribunal to adjudicate certain issues referred to in Part VII of the Competition Act.

Note first the grand purpose of the Act (Section 1.1).

- To maintain and encourage competition in Canada;
- In order to promote the efficiency and adaptability of the Canadian economy;
- In order to expand opportunities for Canadian participation in world markets;
- In order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy; and
- In order to provide consumers with competitive prices and product choices.

To what extent do intellectual property rights and their utilization conflict with those ideals (in many respects conflicting in themselves) and how does the Competition Act implement that purpose?

First, the Act, in section 39, directs itself specifically to the exclusive rights and privileges conferred by one or more patents for invention or by one or more trade marks. Furthermore, where use has been made of those rights and privileges (the following is paraphrased) to restrain or injure *unduly* trade or commerce in relation to any article or commodity which may be the subject of trade or commerce, or to prevent, limit or lessen *unduly* the manufacture or production of any such articles or commodity or unreasonably to enhance the price thereof, or to prevent or lessen *unduly* competition in the production, manufacture, purchase, barter, sale transportation or supply of any such article or commodity, the Federal Court may on the application of the Attorney General of Canada (i) declare any license or a part thereof void, or (ii) restrain any person from carrying out the terms of any such agreement, or (iii) direct the granting of a license, or (iv) revoke a patent or expunge or amend the registration of a trade mark, or (v) direct that such other acts be done or omitted as the court may deem necessary to prevent any such use (i.e., abuse). There is a saving provision that no order shall be made under the section that is at variance with any treaty, convention, arrangement or engagement with any other country respecting patents or trade marks to which Canada is a party.

Despite the breadth of this declaration of public policy, the section has been used very little during its long history. Indeed there are only two cases referred to in the Reports of the Director of Investigation and Research during the last couple of decades, both of which involved Union Carbide of Canada. Both cases were settled after agreed variations of the licensing arrangements.

Section 29 has had a long history and dates back to 1906. However, in 1937, Parliament repealed this section (then section 30). In comment-

ing on the repeal of that section, Maclean J. in *Thermionics Ltd. et al v. Philco Products Ltd. et al*, (1 Fox Patent Cases 166) observed:

I have no doubt the repeal of this section was attributable to the fact that the Patent Act 1935, by sections 65 to 70 (now sections 67 to 72) dealing with the abuse of exclusive rights granted by patents, conferred upon the Attorney General of Canada, or any other interested party, the right to apply to the Commissioner of Patents, after three years from the date of the grant of any patent, for relief, in the case where it was alleged that there had been an abuse of the exclusive rights granted under any such patent. . . . Parliament would appear, in my opinion, to have deliberately legislated so as to exclude from the operation of the Combines Investigation Act and the Criminal Code, anything in the nature of a monopoly derived from the exclusive rights under a patent, and the Patent Act provides the procedure and the remedies for the case where there had been an abuse of such exclusive rights.

Notwithstanding this expression of opinion, in 1946 Parliament re-enacted section 30, presumably in order to implement the McGregor Report on Canada and International Cartels (October 10, 1945). The McGregor Report stated:

The Patent Act does indeed give to a patentee a "monopoly" in the sense that it gives him the "exclusive rights, privilege and liberty of making, constructing, using and vending to others to be used the said invention," but it nowhere authorizes him to agree with other patentees to eliminate competition between them or to conspire to keep their inventions away from outsiders.

In the period 1973 to 1977, several efforts were made to expand the provision and to shift it to the sections which provide for review by a specialized tribunal. All of these efforts were apparently intended to subject intellectual property rights to expanded powers of a specialized tribunal to regulate their use; i.e., to limit their use in circumstances where thought to be occurring. Many observers perceived a bias against intellectual property.

Before commenting further on section 29 and the alternative of review by the Competition Tribunal, it is useful to refer next to section 32 which, using language very similar to section 29, defines the criminal offense of conspiracy (equivalent to restraints of trade under section 1 of the Sherman Act). It is significant that the Canadian Act imports a rule of reason in all cases (except bid rigging as provided for in section 32.2 and price maintenance as provided for in section 38). To counterbalance certain recent Canadian Supreme Court decisions or, at least, in an attempt to inject a note of certainty in a field of uncertainty caused by recent decisions, section 32 (1.1) defines unduly in a negative way; i.e., in stating that it is not necessary, to gain a conviction, to show that the conspiracy, if carried into effect, would or would be likely to eliminate completely or virtually all competition in the market, or that it was the

object of any or all of the parties to eliminate completely or virtually competition in that market. Nor is it necessary to prove that the parties intended that the conspiracy combination agreement or arrangement would have the effect which is set out in the charging section. The courts have generally imposed on the government a substantial challenge to demonstrate that competition has been lessened unduly. However, there appear to be cases which challenge practices involving the use or alleged abuse of intellectual property rights.

Although section 29 does not require an arrangement or agreement which involves two or more parties, the similarity of the language and the fact that it provides for the regulation of the exploitation of property rights may lead reasonably to the conclusion that a court faced with an application under section 29 would apply principles similar to those that have been developed in interpreting the word "unduly" under section 32 or its predecessors. In view of the recent development of reviewable practices now set out in Part VII of the Act, and the debate in the legislative history about the desirability of the application of the civil law standard of proof on a balance of probabilities rather than the criminal law standard of proof beyond a reasonable doubt, it might be argued that section 29 which provides no criminal sanction, should also be applied by the same standard as any other civil or administrative proceedings; i.e., proof on a reasonable balance of probabilities. Viewed, however, as a potential restriction on the enjoyment of property rights, the section probably should be applied only on a showing of substantial proof of harm.

Taken together, the sections give the Attorney General the option to proceed under section 29 against the owner of the patent or trade mark for a regulatory order (or revocation of the patent or expungement of the trademark) or, if a conspiracy is involved, to proceed under the criminal law provision of section 32. Also, the Attorney General may seek, under section 30, an injunction that prohibits the apprehended violation of the anti-conspiracy section. It would appear therefore that the Attorney General may exercise his prosecutorial discretion to not lay a criminal charge but rather to seek an order that prohibits the offense or the continuation of it. One of the many changes proposed in recent years (but not enacted) would have made section 29 specifically and only applicable in the case of an alleged violation of section 32.

It is also notable that any person who has been injured as the result of a violation of section 32 may sue for and recover any damages suffered by him as a result of the illegal action, including his full costs of proceeding under the civil damages section. As a practical matter, it is difficult to mount a civil action in the absence of a previous criminal investigation and conviction. But it is possible to do so, and indeed an action in conspiracy is not necessarily founded on the Competition Act (see *Beaubien v. Canadian General Electric, Westinghouse Canada and Sylvania Canada*, 30 C.P.R. 2d 100 (Que. S. Ct. 1976). However, the plaintiff in that

case did make extensive use of the evidence in the previous conviction under section 32 of the same defendants.

Also in the criminal offenses part of the Competition Act is the anti-price discrimination provision (section 34). It is perhaps arguable whether this section could be applied to licenses of a patent or other intellectual property. The section requires that there be a practice of selling an article to competitors of each other at a discriminatory price, and it is hard to conceive that a license of a right to use intellectual property could be regarded as the sale of an article; although the word article is defined to mean personal property of every description. The rights of a licensee are a kind of personal property, distinct from the intellectual property rights themselves, and it might be argued that the right to use the property is the subject of a sale in a typical licensing situation. In my view, this is an unwarranted distortion of the fairly clear intent of the section, which is to deal with sales as we ordinarily understand them.

Unlike section 34, the anti-price maintenance section (section 38, as amended in 1976) clearly makes it a criminal offense for anyone who has the exclusive right and privilege as conferred by a patent, trademark, copyright, or registered industrial design to attempt, by agreement, threat, promise, or any like means, to influence upward or discourage the reduction of the price at which any other person supplies or offers to supply or advertises a product within Canada. It is an offense to refuse to supply a product because of the low pricing policy of the purchaser. Although product is broadly defined to include a service and an article, it appears that in this case, as well as under section 34, it would be a distortion of the provision to apply it to the refusal to license intellectual property rights. The overall intent, however, of the section is clearly indicated and a court might well interpret a license as the supply of a service or of personal property.

Several reviewable practices were added to the competition law in 1976 (refusal to deal, consignment selling, exclusive dealing, tied selling, and market restriction) and a new provision was added in 1986 (abuse of dominant position) to replace the old anti-monopoly provision which was dropped.

Dealing first with the newest provisions (sections 50 and 51), the concept is that the Tribunal, upon the application of the Director of Investigation and Research, may in certain conditions prohibit the persons charged from engaging in a practice of anti-competitive acts. To bring the section into action, however, the Tribunal must find that one or more persons substantially or completely control a class or species of business throughout Canada or in any part of Canada, that the person or persons have engaged in or are engaging in a practice of anti-competitive acts, and that the practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market. Section 50 contains an illustrative list of anti-competitive acts which, generally speaking, describe situations where a competitor is abusing market power

for a predatory or exclusionary purpose. The use of the term anti-competitive clearly implies that ordinary acts of active, vigorous competition are not to be the subject of regulation under that section. Furthermore, the section specifically states (section 51 (5)) that an act engaged in pursuant *only* to the exercise of any right or enjoyment of any interest *derived under* the Copyright Act, Industrial Design Act, Patent Act, Trade Marks Act, or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act. This provision is continued from the definition of monopoly which had existed for many years in the Combines Investigation Act, the predecessor to the Competition Act. The 1986 revision extended the exemptions by referring specifically to other statutes in addition to the Patent Act, and limits the basket reference to any other property. Presumably, "any right or enjoyment of any interest derived under" will be literally interpreted to mean, for example, the refusal to grant a license, but will not protect the exploitation of market power by leveraging off and beyond the property right itself. Whatever solace owners of intellectual property rights may gain from the exemption in section 51, they must remember that section 29 specifically addresses them insofar as they may be perceived to be utilizing their property rights so as to unduly restrain or injure competition generally, or in the ways described particularly in that section. Nor does the saving sub-section have any operation in the face of section 32, the criminal conspiracy section, *or any other section*.

So far, the score against the intellectual property owner is two civil remedies, one which may be initiated by the Director of Investigation and Research, and the other by the Attorney General of Canada (two distinct arms of the Government of Canada), and one criminal law sanction (again, generally initiated by the Attorney General of Canada upon information supplied to him by the Director of Investigation and Research) and the ancillary civil remedy of a prohibition order issued by a court on the initiative of the Attorney General where alleged or apprehended violation of a criminal provision is shown.

It is arguable that some of the other matters reviewable by the Tribunal may be applicable to licenses or other contracts involving intellectual property. In my view, these sections, which deal with refusal to deal, exclusive dealing, tied selling and market restrictions, are fairly clearly intended to apply to the supply of an article or a service, although the definition of "article," as noted before, includes personal property of every description and might be held to apply to the supply of rights to use intellectual property. Similarly, a show-how license might be construed as a service. With regard to refusal to deal, however, it seems to me that the concept is entirely at odds with the notion of the right to refuse to license at all. Section 67 of the Patent Act, in particular section 67 (1)(i)(d), applies to some extent to the same situation. In any case, it is likely that the Tribunal would defer to the jurisdiction of the Commissioner (or the court, under section 29) and would not attempt to distort

the refusal to deal section of the Competition Act to the extent needed in order to apply it to refusal to license. Similarly, it seems that the exclusive dealing and/or tied selling concepts (Competition Act, section 49), while the broadest definition of product and customer might include the licensing of a patent or other intellectual property rights, were not intended to reach the case of a licensor who attempts to impose upon his licensee the obligation to deal only in products of the licensor (as in the case of the supply of components for the licensed products). I am fortified in this view by the provision which makes it a precondition for action by the Tribunal that it must be shown that exclusive dealing or tied selling is engaged in by a major supplier of a product in a market or because the practice is widespread in a market. Moreover, the market restriction concept also refers to the supplier of a product and his customer, hardly terms generally understood to apply to license arrangements. As in the case of exclusive dealing and tied selling, it must also be shown that the practice is engaged in by a major supplier of a product or is widespread in relation to a product. It is hardly necessary for the Competition Tribunal to distort these sections in view of the fact that adequate remedies are available elsewhere in the same statute (section 29) or in the Patent Act (section 67).

There has been no significant jurisprudence in respect of any of these provisions where the exploitation of intellectual property right was at the heart of the issue. Canadian General Electric and Union Carbide Canada were charged with monopolization under the Combines Investigation Act in that during a period from 1960 to 1972, [of] “substantially or completely controlling throughout Canada the business of manufacturing, supplying and selling crosslinkable [sic] polyethylene compounds for use as insulation for electrical wire and cable [. . . they] have operated or are likely to operate such business to the detriment or against the interest of the public.” At first reluctant to license anyone to produce cross-linkable polyethylene, CGE finally agreed to grant a nonexclusive license to Union Carbide to make, use and sell cross-linkable polyethylene as covered by the patent, but with the condition that the license to sell did not extend to any sale made by Union Carbide to a purchaser of the product for wire and cable application who did not have the in-house expertise and capability to mix the cross-linkable polyethylene with other ingredients prior to extrusion as an insulating coating for power cables. The possession and use of a “Banbury mixer” and the regular employment of a skilled compounding chemist by the purchaser were the principal requirements. Four major producers of wire and cable qualified but many others did not. It was therefore alleged that CGE and Union Carbide had monopolized the business of cross-linkable polyethylene insulation to the detriment of the public.

Of course, it is instantly obvious that a fundamental question is whether that particular kind of insulation is a class or species of business where there were several other insulation techniques and materials com-

monly in use. In dismissing the case at the preliminary hearing, Judge Charles of the Ontario Provincial Court based his decision not only on the class or species of business issue but found also, by relying on a series of U.S. cases, that a patentee could not be found guilty of a monopoly offense unless he used his licensing arrangement to extend the scope of the patent grant. Applying that line of reasoning, he found that CGE's licensing policy was not an attempt to extend the scope of its patent rights. Although Judge Charles stated his intention to provide written reasons following his dismissal of the charge from the bench, he shortly thereafter suffered an injury and written reasons were never released. The Government did not choose to refer an indictment directly to the Superior Court, although it had the option of doing so. If a similar case were brought under the new section which deals with "abuse of monopoly," Judge Charles' rationale would also likely apply to protect the restrictive practice as the exercise of a right *derived under* the patent grant.

By that case, it was assumed that the Government was attempting to test the scope of the monopoly provisions in connection with patent rights, as it had done earlier with respect to section 29 in two actions against Union Carbide Canada (various patents dealing with polyethylene film and techniques for printing thereon) and in a few cases (otherwise not reported) referred to by Mr. Henderson in his address to the Patent and Trade Mark Institute of Canada in 1981 (Bulletin of the PTIC, volume 13, page 840). Not one of these cases were litigated to a judicial decision. It is significant that in the insulation case, the Government elected to proceed exclusively under the then Section 33 by alleging a joint monopoly but did not proceed under Section 29 or 32.

ABUSE OF EXCLUSIVE RIGHTS GRANTED BY A PATENT — THE PATENT ACT

Canada introduced into its law, at a very early stage, the concept that a patent monopoly became void after a period of time if the subject matter of the patented invention was not being manufactured in Canada. The Patent Act of 1869 set a three year period from the date of patent grant, after which manufacture in Canada must be commenced, and continuously carried on, in order to maintain the patent. The Act also provided for avoidance of the patent if the subject matter of the patent was imported after eighteen months from the date of grant. In 1872, the above periods were reduced to two years and one year respectively.

The law did not change until 1923, when, in order to permit Canada to join the Paris Convention for the Protection of Industrial Property, a comprehensive amendment to these provisions were made to essentially conform to the abuses provisions in the British Act of 1907. Subsequent amendments were made in 1935 and the abuse provisions adopted by the 1935 Act are still in effect today. Under the present statute, the Attorney General of Canada *or any person interested* may, at any time after the expiration of three years from the date of grant of a patent, apply to the

Commissioner alleging an abuse of the exclusive rights and request relief as provided for in the Act.

Sections 66 to 73 of the present Patent Act deal with the abuse of rights granted under patents. Section 67 sets forth the following circumstances in which the exclusive rights shall be deemed to have been abused:

(1) *Section 67 (2)(a)*

— Failure to work the patented invention on a commercial scale in Canada. The term “work on a commercial scale” means the manufacture of the article or the carrying on of the process described and claimed in a specification for a patent, in or by means of a definite and substantial establishment or organization and on a scale that is adequate and reasonable under the circumstances.”

(2) *Section 67 (2)(b)*

— Importation of the patented article by the patentee or his licensee or by persons against whom the patentee has not taken infringement proceedings, if such importation hinders the working of the invention in Canada.

(3) *Section 67 (2)(c)*

— Demand for the patented article in Canada is not met to an adequate extent and on reasonable terms.

(4) *Section 67 (2)(d)*

— Refusal to grant a license on reasonable terms, resulting in prejudice to the trade or industry of Canada, or the establishment of a new trade or industry in Canada, provided it is in the public interest that a license be granted.

(5) *Section 67(2)(e)*

— The conditions attached by the patentee to the purchase, license or use of the patented article, or to the using or working of the patented process, result in prejudice to trade or industry in Canada.

(6) *Section 67 (2)(f)*

— Use of a patent for a process involving the use of materials not protected by the patent, or for an invention relating to a substance produced by such process, to unfairly prejudice the manufacture, use or sale in Canada of any such materials.

Section 68 of the Patent Act provides for remedies where abuse is established. The remedies fall into two principal categories: a) the grant of a compulsory license, and b) the revocation of the patent.

Where a case of abuse is established, the Commissioner may order the grant of a license on such terms as he thinks expedient. The license may include a term which precludes the licensee from importing into Canada any article or goods covered by the patent. In such event, the patentee and any existing licensees shall no longer have the right to import the patented article into Canada. Any compulsory license granted by the Commissioner gives the licensee the right to call on the patentee to

enforce the patent against infringers, and failure to do so within two months of a request for enforcement will result in the licensee having the right to institute proceedings in its own name.

The Commissioner may grant an exclusive license where the invention is not being employed on a commercial scale in Canada and an abuse of the exclusive rights is established under either (1) or (2) of the abuses referred to above, and he is satisfied that, in order to justify the expenditure of capital necessary to employ the invention in Canada, exclusive rights are required. Any such exclusive license granted by the Commissioner is required to secure to the patentee the maximum royalty which is compatible with the licensee who is employing the invention in Canada on a commercial scale and at a reasonable profit, and to guarantee to the patentee a minimum yearly sum by way of royalty, if it is reasonable to do so with regard to the capital required for the proper employment of the invention. Orders and decisions of the Commissioner of Patents under these abuse provisions are appealable to the Federal Court.

PROSPECTS

Although there have been flurries of excitement about fundamental changes in the laws establishing industrial property rights, there is little evidence that the general subject is a high priority policy issue in Canada. The amendments to the Patent Act now under consideration in Parliament focus on the pharmaceutical licensing issue (a question not essentially related to competition policy) and include a number of changes such as introducing first-to-file in place of first-to-invent and replacing the seventeen-years-from-grant rule with the more widespread twenty-years-from-filing rule. Otherwise, debate is hard to find on the patent front. Attention is being given to some important issues in copyright, but, to my knowledge, there is no expressed concern about the competition law interface.

CONCLUSION

Intellectual property rights are similar to the other property rights in that they may be exploited subject to other relevant considerations. One of those considerations is competition law. While a body of experience has developed around the abuse provisions, none of the jurisprudence explores the relevance of competition law. It is significant that there has not been any case experience in Canada to refine the issues and delineate the interface or define the overlap between competition law and intellectual property law. After a diligent search for clues, I have to tell you that there are none!